SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 112

DAVIES WAREHOUSE COMPANY, PETITIONER,

vs.

PRENTISS M. BROWN, PRICE ADMINISTRATOR

ON WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

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Before the

United States Emergency Court of Appeals

DAVIES WAREHOUSE COMPANY, a corporation,

Complainant,

vs.

LEON HENDERSON, Price Administrator,

Respondent.

COMPLAINT

The complaint of Davies Warehouse Company respectfully shows, and your complainant avers as follows, to-wit:

I.

That complainant is now, and during all of the times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its post office address is 126 South Central Avenue, Los Angeles, California.

That complainant is a "warehouseman" as defined in Section 2½ of the Public Utilities Act of the State of California (Statutes of California, 1915, Chapter 91, as amended) which reads as follows:

"The term 'warehouseman', when used in this act, includes every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any building, or structure, or warehouse, in which merchandise, other than second-hand household goods or effects, and other than merchandise sold but retained in the custody of the vendor, is regularly stored for the public generally, for compensation, within this state, excepting warehouses conducted by any non-profit, cooperative association or corporation which is engaged in the handling or marketing of the agricultural products of its members; also excepting warehouses conducted by the agents, individual or corporate, of such associations or corporations, while acting within the limitations imposed by law on the principal of any such agent."

7

That in the conduct of its business, which is wholly within the City of Los Angeles, California, complainant stores and handles general merchandise for the public generally, for compensation, and renders other services incident thereto.

That complainant is a public utility as that term is defined in Section 2(dd) of said Public Utilities Act, reading as follows:

"The term 'public utility', when used in this act, includes every common carrier, toll-bridge corporation, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, wharfinger, warehouseman, and heat corporation, where

the service is performed for or the commodity delivered to the public or any portion thereof."

That the business of complainant as a warehouseman is subject to regulation by the legislature of the State of California under and by virtue of the provisions of Section 33, of Article IV of the Constitution of the State of California, reading as follows:

"The legislature shall pass laws for the regulation and limitation of the charges for services performed and commodities furnished by telegraph and gas corporations, and the charges by corporations or individuals for storage and wharfage, in which there is a public use; and where laws shall provide for the seleetion of any person or officer to regulate and limit such rates, no such person or officer shall be selected by any corporation or individual interested in the business to be regulated, and no person shall be selected who is an officer or stock holder in any such corporation."

That under and by virtue of Section 23 of Article XII of said Constitution, the business of a warehouseman, such as is engaged in by complainant, was declared to be a public utility and subject to such control and regulation by the Railroad Commission as might be conferred upon it by the legislature of the State of California; that section of the Constitution, insofar as is here pertinent, reads as follows:

"Every private corporation, and every individual or association of individuals, owning, operating, managing, or controlling any commercial railroad, interurban railroad, street railroad, canal, pipe line, plant, or equipment, or any part of

such railroad, canal, pipe line, plant, or equipment within this state, for the transportation or conveyance of passengers, or express matter, or freight of any kind, including crude oil or for the transmission of telephone or telegraph messages, or for the production, generation, transmission, delivery or furnishing of heat, light, water or power or for the furnishing of storage or wharfage facilities, either directly or indirectly, to or for the public, and every common carrier, is hereby declared to be a public utility subject to such control and regulation by the Railroad Commission as may be provided by the legislature, and every class of private corporations, individuals, or associations of individuals hereafter declared by the legislature to be public utilities shall likewise be subject to such control and regulation. The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the legislature, and the right of the legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution. * * *."

That complainant is filing this complaint on behalf of itself and on behalf of all other warehousemen who are subject, as public utilities, to the jurisdiction and control of the Railroad Commission of the State of California under and by virtue of said Sections 2(dd) and 2½ of said Public Utilities Act, and under and by virtue of said Section 33 of Article IV and said

Section 23 of Article XII of the Constitution of the State of California; that complainant and all of said warehousemen who are under the jurisdiction and control of said Railroad Commission under and by virtue of said Statutes and said Constitutional provisions (hereinafter referred to as "such other warehousemen"), are bailees for hire in the same general class of business and all thereof operate solely within the State of California.

II.

That respondent is now, and during all of the times herein mentioned was, the duly appointed, qualified and acting Price Administrator under the provisions of the Emergency Price Control Act of 1942 (Public Law 421—77th Congress; Chapter 26—2nd Session; HR-5990).

III.

That the regulations issued by respondent and the dates of issuance thereof to which complainant has protested are as follows:

(a) The General Maximum Price Regulation issued on April 28, 1942;

(b) Supplementary Regulation No. 11, issued on June 16, 1942, of said General Maximum Price Regulation, and

(c) Amendment No. 1 to Supplementary Regulation No. 11, issued on June 23, 1942, of said General Maximum Price Regulation.

IV.

That the date on which the protest of such regulations was filed with respondent was June 26, 1942; that respondent denied said protest on the 27th day of July, 1942.

V.

That the manner in which complainant has been aggrieved by the denial of its protest is as follows:

That under the provisions of the Emergency Price Control Act of 1942, and particularly under Section 302(c)(2) thereof, the rates charged by your complainant as a public utility are not subject to the regulations of respondent; that irrespective of, and contrary to, the fact that the rates charged by your complainant as a public utility are not subject to the regulations of respondent, he has construed said Maximum Price Regulation of April 28, 1942 to include the rates charged by your complainant for public utility storage and warehousing and all services incident thereto to be subject to his regulations;

That under the provisions of Supplementary Regulation No. 11 issued by respondent on June 16, 1942, of said General Maximum Price Regulation, and particularly under sub paragraph (2) of paragraph (a) of Part 1499.46 thereof, the rates charged by your complainant for said services are, by implication, governed by the regulations contained in said General Maximum Price Regulation of April 28, 1942, irrespective of, and contrary to, the fact that said rates are exempt from such regulations under and

by virtue of said Section 302(c)(2) of the Emergency Price Control Act of 1942.

That under the provisions of Amendment No. 1 to Supplementary Regulation No. 11 issued by respondent on June 23, 1942 of said General Maximum Price Regulation of April 28, 1942, and particularly under sub paragraph (68) of paragraph (b) of Part 1499.46 thereof the charges of a public utility warehouseman for storage and warehousing and all other services incident thereto are not excluded from the General Maximum Price Regulation, irrespective of, and contrary to, the fact that such charges are exempt from such regulations under and by virtue of the provisions of said Section 302(c)(2) of the Emergency Price Control Act of 1942.

That by reason of the aforesaid regulations, respondent has erroneously, unlawfully and arbitrarily subjected the rates charged for said services by complainant and such other warehousemen to the regulations imposed by and under the said General Maximum Price Regulation of April 28, 1942, and, unless the regulations herein complained of are set aside insofar as they include the charges of complainant and such other warehousemen for said services, your complainant and such other warehousemen will be required to charge for said services the rates which they were assessing and collecting for said services during the month of March 1942 instead of increased rates for said services as may be prescribed by the Railroad Commission of the State of California under the provisions of said Public Utilities Act, particularly under Section 63(a) thereof, reading as follows:

"No public utility shall raise any rate, fare, toll, rental or charge or so alter any classification, contract, practice, rule or regulation as to result in an increase in any rate, fare, toll, rental or charge, under any circumstances whatsoever, except upon a showing before the commission and a finding by the commission that such increase is justified."

That, in particular, your complainant and such other warehousemen have been aggrieved by the denial by respondent of said protest because the rates charged by them for storage and warehousing and all services incident thereto under the regulations herein complained of are frozen as of March 1942, except insofar as increases have been approved by respondent in his Order No. 7 (1499.357) of July 29, 1942, in respondent's Docket No. GF3-453 and his Order No. 8 (1499.358) of July 29, 1942, in respondent's Docket No. GF3-454; that even the increases as approved by respondent in his said Orders Nos. 7 and 8 may, by their terms, "be revoked or amended by the Price Administrator at any time"; that by reason of the denial by respondent of said protest, complainant and such other warehousemen are placed under two price ceilings, namely: that fixed by said Railroad Commission and that erroneously, unlawfully and arbitrarily fixed by respondent, the result of which is to require complainant and such other warehousemen to first obtain authorization from said Railroad Commission to increase their rates for said services upon a finding that such increases are justified based upon said Railroad Commission's stand-

ard of sufficiency of a showing after which complainant and such other warehousemen will not be able to publish and make effective the increased rates as authorized by said Railroad Commission on the effective date of said Railroad Commission's order but will then be required to file an Application for Adjustment under Section 1499.18 of said General Maximum Price Regulation with consequent delay, needless expense and to the financial detriment of complainant and such other warehousemen; that inasmuch as complainant and such other warehousemen are exempt from the regulations of respondent, they should not be subjected to the provisions of the regulations herein complained of and said regulations should be set aside insofar as the charges of complainant and such other warehousemen for said services are concerned.

VI.

That each objection asserted against said regulations upon which complainant intends to rely are as follows:

1. Objection is hereby made to the General Maximum Price Regulation of April 28, 1942, if the provisions thereof are to be construed as including under its regulation the rates or charges of your complainant and such other warehousemen for public utility storage and warehousing and all other services incident thereto.

That the grounds in support of this objection are as follows:

Complainant and such other warehousemen who are in the same general class of business within the State of California and who are subject to the jurisdiction and control of the Railroad Commission of the State of California, particularly under and by virtue of said Section 2½ of said Public Utilities Act, are public utilities and will continue to be public utilities, under the jurisdiction and control of said Commission.

Complainant and such other warehousemen are public utilities within the meaning of the exemption contained in said sub paragraph (2) of paragraph (c) of Section 302 of said Emergency Price Control Act of 1942, and the provisions of the said General Maximum Price Regulation of April 28, 1942, the said Supplementary Regulation No. 11 of June 16, 1942 and the said Amendment No. 1 to Supplementary Regulation No. 11 of June 23, 1942, are void and of no effect whatever insofar as they declare that the rates charged for storage and warehousing and all other services incident thereto by a public utility, such as complainant and such other warehousemen, are not excluded from the regulations imposed by and under the said General Maximum Price Regulation. The action of respondent in denying said protest on the ground that complainant is not a public utility within the exemption of 302(c)(2) of the Emergency Price Control Act of 1942 was, and is, arbitrary, unlawful, erroneous and capricious.

2. Objection is also hereby made to the provisions of Supplementary Regulation No. 11 issued on the

16th day of June, 1942, of the General Maximum Price Regulation of April 28, 1942, insofar as the same, by implication, includes under its regulations the rates and charges of your complainant and such other warehousemen for public utility storage and warehousing and all other services incident thereto.

The grounds in support of this objection are the same as are urged in support of Objection No. 1 herein, and said grounds are hereby referred to and made a part hereof by such reference.

3. Objection is also hereby made to the provisions of Amendment No. 1 to Supplementary Regulation No. 11 issued on the 23rd day of June, 1942, of the General Maximum Price Regulation of April 28, 1942, insofar as the same includes under its regulations the rates and charges of your complainant and such other warehousemen for public utility storage and warehousing and all other services incident thereto.

The grounds in support of this objection are the same as are urged in support of Objection No. 1 herein, and said grounds are hereby referred to and made a part hereof by such reference.

VII.

That the nature of the relief requested by complainant is as follows: Complainant requests an order of this Honorable Court setting aside said regulations insofar as they include the charges of complainant and such other warehousemen for public utility storage and warehousing and all services incident thereto.

WHEREFORE, your complainant asks that this Honorable Court make its order setting aside (a) The General Maximum Price Regulation issued by respondent on April 28, 1942, (b) Supplementary Regulation No. 11 issued by respondent on June 16, 1942 of said General Maximum Price Regulation, and (c) Amendment No. 1 to Supplementary Regulation No. 11 issued by respondent on June 23, 1942 of said General Maximum Price Regulation insofar as they, and each of them, include under their regulations the charges of complainant and such other warehousemen for public utility storage and warehousing and all services incident thereto.

Dated at San Francisco, California, this 20th day of August, 1942.

DAVIES WAREHOUSE COMPANY,
By L. A. BAILEY,
Its Vice-President.

REGINALD L. VAUGHAN,
Attorney for Complainant
Mills Tower, San Francisco,
California.

[fols. 13-14] IN THE UNITED STATES EMERGENCY COURT OF APPEALS

No. 5

DAVIES WAREHOUSE COMPANY, a Corporation, Complainant,

v.

LEON HENDERSON, Price Administrator, Respondent

ANSWER

Now comes Leon Henderson, Price Administrator of the Office of Price Administration, Respondent, by his duly authorized attorney, and pursuant to Rule No. 16 of the Rules of this Court, makes answer to the complaint of Davies Warehouse Company, a corporation, Complainant herein, by admitting, for purposes of the proceedings on the Complaint, or denying, facts alleged therein as follows:

(1) Respondent admits the facts alleged in unnumbered paragraphs 1 and 3 of Section I of said Complaint;

(2) Respondent neither admits nor denies the allegations of unnumbered paragraphs 2, 4, 5, 6, and 7 of Section I of said Complaint but affirmatively states such allegations to be conclusions of law to which Respondent does not plead;

(3) Respondent admits the facts alleged in Sections II, III, and IV of said Complaint;

[fols. 15-16] (4) Respondent denies the allegations of Sections V and VI of said Complaint, except that Respondent admits that he has construed said General Maximum Price Regulation of April 28, 1942 as applicable to the rates charged by Complainant for its storage, warehousing and services incident thereto.

(5) Respondent affirmatively alleges and states the fact to be that by Respondent's Order No. 8 under Section 1499.18 (c) of the General Maximum Price Regulation (7 Fed. Reg. 5913) Respondent authorized the Complainant to sell and deliver, and authorized any person to buy and receive from the Complainant, storage and warehousing and services incident thereto at prices not higher than the

rates and charges authorized by the Railroad Commission of the State of California in its Decision No. 35361, in Application No. 24723, dated May 12, 1942, and admits that by its terms such Order No. 8 may be revoked or amended by the Price Administrator at any time.

Wherefore, the Respondent prays that the Complaint be dismissed.

David Ginsburg, General Counsel.

In the United States Emergency Court of Appeals

No. 5

DAVIES WAREHOUSE COMPANY, A CORPORATION,
COMPLAINANT

v.

LEON HENDERSON, PRICE ADMINISTRATOR, RESPONDENT

TRANSCRIPT OF PROCEEDINGS BEFORE THE PRICE ADMINISTRATOR

[PROTEST FILED WITH THE SECRETARY OF THE OFFICE OF PRICE ADMINISTRATION ON JUNE 26, 1942]

BEFORE THE OFFICE OF PRICE ADMINISTRATION

Docket Number GFI–428–P

In the Matter of the Protest of DAVIES WAREHOUSE COMPANY, a corporation, to the provisions of the General Maximum Price Regulation of April 28, 1942, to Supplementary Regulation No. 11 thereof, issued on the 16th day of June 1942, and to Amendment No. 1 of Supplementary Regulation No. 11 thereof, issued on the 23d day of June 1942

Protest to general maximum price regulation of April 28, 1942, to Supplementary Regulation No. 11 thereof, issued on the 16th day of June 1942, and to Amendment No. 1 of Supplementary Regulation No. 11, issued on the 23d day of June 1942

The protest of Davies Warehouse Company, a corporation, respectfully shows and your protestant avers as follows, to wit:

I

That your protestant is a corporation duly organized and existing under and by virtue of the laws of the State of California; that its post-office address is 126 South Central Avenue, Los Angeles, California.

That the nature of the business of protestant is as follows: Your protestant is a "warehouseman" as defined in Section 2½ of the Public Utilities Act of the State of California (Statutes of California, 1915, Chapter 91, as amended) which reads as follows:

> The term "warehouseman" when used in this act, includes every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any building, or structure, or warehouse, in which merchandise, other than second-hand household goods or effects, and other than merchandise sold but retained in the custody of the vendor, is regularly stored for the public generally, for compensation, within this State, excepting warehouses conducted by any nonprofit, cooperative association or corporation which is engaged in the handling or marketing of the agricultural products of its members; also excepting warehouses

> conducted by the agents, individual or corporate, of such associations or corporations, while acting within the limitations imposed by law on the principal of any such agent.

In the conduct of its business, which is conducted in the City of Los Angeles, California, your protestant stores and handles general merchandise for the public generally, for compensation, and renders other services incident thereto.

Your protestant is a public utility as that term is defined in Section 2 (dd) of said Public Utilities Act, reading as follows:

> The term "public utility", when used in this act, includes every common carrier, toll-bridge corporation, pipe-line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, wharfinger, warehouseman, and heat corporation, where the service is performed for or the commodity delivered to the public or any portion thereof.

The business of your protestant as a warehouseman is subject to regulation by the legislature of the State of California by virtue of the provisions of Section 33, of Article IV of the Constitution of the State of California, reading as follows:

> The legislature shall pass laws for the regulation and limitation of the charges for services performed and commodities furnished by telegraph and gas corporations, and the charges by corporations or individuals for storage and wharfage, in which there is a public use; and where laws shall provide for the selection of

any person or officer to regulate and limit such rates, no such person or officer shall be selected by any corporation or individual interested in the business to be regulated, and no person shall be selected who is an officer or stockholder in any such corporation.

Under Section 23 of Article XII of said Constitution, the business of a warehouseman, such as is engaged in by your protestant, was declared to be a public utility and subject to such control and regulation by the Railroad Commission as might be conferred upon it by the legislature of the State of California; that section of the Constitution, insofar as is here pertinent, reads as follows:

> Every private corporation, and every individual or association of individuals, owning, operating, managing, or controlling any commercial railroad, interurban railroad, street railroad, canal, pipe line, plant, or equipment, or any part of such railroad, canal, pipe line, plant, or equipment within this state, for the transportation or conveyance of passengers, or express matter, or freight of any kind, including crude oil or for the transmission of telephone or telegraph messages, or for the production, generation, transmission, delivery or furnishing of heat, light, water or power or for furnishing of storage or wharfage facilities, either directly or indirectly, to or for the public and every common carrier, is hereby declared to be a public utility subject to such control and regulation by the Railroad Commission as may be provided by the legislature, and every class of private corporations, individuals, or associations of individuals here-

after declared by the legislature to be public utilities shall likewise be subject to such control and regulation. The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the legislature, and the right of the legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution * * *.

That your protestant is filing this protest on behalf of itself and on behalf of all other warehousemen who are subject to the jurisdiction and control of the Railroad Commission of the State of California under and by virtue of said Sections 2 (dd) and 2½ of said Public Utilities Act, and under and by virtue of said Section 33 of Article IV and said Section 23 of Article XII of the Constitution of the State of California; that your protestant and all of said warehousemen who are under the jurisdiction and control of said Railroad Commission under and by virtue of said Statutes and said Constitutional provisions, are bailees for hire in the same general class of business and all thereof operate solely within the State of California.

That the manner in which your protestant is subject to the regulations herein protested is as follows:

Under the provisions of the Emergency Price Control Act of 1942 (Public Law 421, 77th Congress; Chapter 26, 2nd Session; H. R. 5990) and particularly sub-

paragraph (2) of paragraph (c) of Section 302 thereof, the rates charged by your protestant as a public utility are not subject to the regulations of the Office of Price Administration;

Under the provisions of the General Maximum Price Regulation of April 28, 1942, and particularly under paragraph (e) of Section 10 thereof, the rates charged by your protestant as a public utility are not subject to the provisions thereof.

Under the provisions of Supplementary Regulation No. 11 of the Office of Price Administration of June 16, 1942 and particularly under subparagraph (2) of paragraph (a) of Part 1499.46 thereof, the rates of your protestant are, by implication, governed by the regulations contained in the General Maximum Price Regulation of April 28, 1942, despite the fact that said rates are exempt from such regulations under and by virtue of the said provisions of the Emergency Price Control Act of 1942.

Under the provisions of Amendment No. 1 to Supplementary Regulation No. 11 of the General Maximum Price Regulation of April 28, 1942, and particularly under subparagraph (68) of paragraph (b) of Part 1499.46 thereof, the "charges for storage and warehousing and all other services incident thereto by any person shall not be excluded from the General Maximum Price Regulation" despite the fact that said charges are exempt from such regulations under and by virtue of the said provisions of the Emergency Price Control Act of 1942.

II

That the name of the person filing this protest on behalf of protestant is L. A. Bailey, and his post office address is 216 Pine Street, San Francisco, California; that the name of the person to whom all communications from the Office of Price Administration relating to this protest shall be sent is Reginald L. Vaughan, and his post office address is Mills Tower, 220 Bush Street, San Francisco, California.

III

That a statement of all objections raised by protestant is as follows:

1. Protest is hereby made to the General Maximum Price Regulation of April 28, 1942, if the provisions thereof are to be construed as including under its regulation the rates or charges of your protestant and such other warehousemen who are in the same general class of business within the State of California, as aforesaid.

2. Protest is also hereby made to the provisions of Supplementary Regulation No. 11 issued on the 16th day of June 1942 of the General Maximum Price Regulation of April 28, 1942, insofar as the same, by implication, includes, under its regulations, the rates and charges of your protestant and such other warehousemen.

3. Protest is also hereby made to the provisions of Amendment No. 1 of Supplementary Regulation No. 11 issued on June 23, 1942, of the General Maximum Price Regulation of April 28, 1942, insofar as the

same includes under its regulations the rates and charges for storage and warehousing and all other services incident thereto by your protestant and such other warehousemen.

IV

That a statement of all facts alleged in support of this protest is as follows:

Your protestant and such other warehousemen who are in the same general class of business within the State of California and who are subject to the jurisdiction and control of the Railroad Commission of the State of California, particularly under and by virtue of said Section 2½ of said Public Utilities Act, are public utilities and will continue to be public utilities, under the jurisdiction and control of said Commission. As public utilities your protestant and such other warehousemen are subject to the burdens of the laws of the State of California and are entitled to the benefits thereof; that as public utilities, your protestant and such other warehousemen:

(a) Are required to file certified annual reports with said Railroad Commission in the form required by said Commission under its prescribed uniform system of accounts;

(b) Must file, publish, and keep open to public inspection, their tariff rates and charges, rules and regulations;

(c) Must charge rates and render service to all members of the public alike, without undue discrimination or preference;

(d) Must abide by their schedules of rates and charges as published and filed with said Railroad Commission until changed in the manner provided in said Public Utilities Act;

(e) Are subject to investigation as to the reasonableness of their rates and charges upon complaint made by said Railroad Commission on its own motion, or upon complaint of any member of the public, and

(f) Are required to maintain and operate their warehouse facilities in a safe and dependable manner and in all respects adequate for the purposes to which such facilities are devoted, to wit, as warehousemen for the storage and handling of property for the public generally, for compensation.

There are other restraints imposed upon your protestant and such other warehousemen because of the fact that they are public utilities, such as the prohibition against the selling, leasing, transferring, or encumbering of their public-utility facilities without the approval of the Railroad Commission of the State of California, and the prohibition against their issuing stock or incurring obligations without the consent of said Railroad Commission.

As public utilities your protestant and such other warehousemen are subject to the same degree of regulation and control by said Railroad Commission as are common carriers by rail, vessel and motor carrier, since warehousemen and said classes of common carriers are subject to, and are regulated by, the same Statute, namely, the Public Utilities Act of the State of California, which also includes the regulation of

other classes of public utilities, such as gas corporations, electric corporations, telephone corporations, telegraph corporations and water corporations.

The failure on the part of your protestant and such other warehousemen, and the officers and employees thereof to comply with the provisions of said Public Utilities Act, and the orders of said Railroad Commission rendered thereunder, constitute violations of the law, which would subject them to imposition of penalties or imprisonment.

Your protestant and such other warehousemen are public utilities within the meaning of the exemption contained in said subparagraph (2) of paragraph (e) of Section 302 of said Emergency Price Control Act of 1942, and the provisions of the said General Maximum Price Regulation of April 28, 1942, the said Supplementary Regulation No. 11 of June 16, 1942, and the said Amendment No. 1 to Supplementary Regulation No. 11 of June 23, 1942, are void and of no effect whatever insofar as they declare that rates and charges for storage and warehousing and all other services incident thereto by a public utility, such as your protestant and such other warehousemen, are not excluded from the regulations imposed by and under the said General Maximum Price Regulation.

That your protestant has a right to file this protest by virtue of the fact that, since the Price Administrator has erroneously, unlawfully, and arbitrarily subjected your protestant and such other warehousemen to the regulations imposed by and under the said General Maximum Price Regulation of April 28, 1942,

your protestant will be required to charge for storage and warehousing and all other services incident thereto, the charges which your protestant was assessing and collecting during the month of March, 1942, instead of the increased charges for such services as have been prescribed by the Railroad Commission of the State of California in its Decision No. 35361, of the 12th day of May, 1942, in Application No. 24723; that a true copy of said Decision No. 35361 is attached hereto, made a part hereof and marked Exhibit "A".

That said application and said decision were filed and rendered under and pursuant to the provisions of Section 63 (a) of said Public Utilities Act, reading as follows:

> No public utility shall raise any rate, fare, toll, rental, or charge, or so alter any classification, contract, practice, rule, or regulation as to result in an increase in any rate, fare, toll, rental, or charge, under any circumstances whatsoever, excepting upon a showing before the Commission and a finding by the Commission that such increase is justified.

That the rates charged and assessed by your protestant during the month of March 1942 (which would be frozen under said regulation), are lower than the rates which are now in effect and which have been in effect since June 1, 1942, as authorized by said Railroad Commission in its said Decision No. 35361; that the increases in the rates as authorized by said decision were based upon an increase in the cost of labor to your protestant, and such increases were, are, and

will continue to be necessary in order that your protestant may continue to render adequate warehousing service to the general public.

That these increased labor costs which made these increased rates necessary were largely experienced by your protestant in November of 1941, and your protestant would have increased its rates to the same extent as authorized by said Decision No. 35361 during that month, except for the fact that, as a public utility, it was restrained from so doing under the provisions of said Section 63 (a) of said Public Utilities Act, prohibiting the increase in any rate or charge under any circumstances whatsoever, except upon a showing before said Railroad Commission and a finding by that Commission, that such increase is justified.

That in view of all of these facts and particularly the fact that protestant and such other warehousemen are public utilities, they should be declared exempt from the regulations imposed by and under the General Maximum Price Regulation of April 28, 1942, as the same is now or may hereafter be amended.

That there is attached hereto, made a part hereof, and marked Exhibit "B" an affidavit of L. A. Bailey setting forth in full all the evidence, the presentation of which is subject to the control of the protestant, upon which protestant relies in support of the facts alleged herein.

That there is attached hereto, made a part hereof, and marked Exhibit "C" an affidavit of L. A. Bailey setting forth in detail the material and sources of further evidence, not subject to his control, upon

which he believes he can rely in support of the facts alleged herein.

WHEREFORE, your protestant protests to the provisions of the General Maximum Price Regulation of April 28, 1942, insofar as the same may be construed to subject the rates and charges of the public utility services rendered by protestant to regulation thereunder.

Your protestant protests to subparagraph (2) of paragraph (a) of Part 1499.46 of Supplementary Regulation No. 11 of the General Maximum Price Regulation of April 28, 1942, insofar as it regulates, by implication, the rates and charges of protestant and such other warehousemen and hereby request that such subparagraph be changed to read as follows:

> (2) Commercial storage and warehousing and services incident thereto other than public utility warehousemen within the exemption conferred by Section 302 (c) of the Emergency Price Control Act of 1942.

Your protestant protests to subparagraph (68) of paragraph (b) of Part 1499.46 of Amendment No. 1 to Supplementary Regulation No. 11 of the General Maximum Price Regulation of April 28, 1942, insofar as it regulates the rates and charges of protestant and such other warehousemen and hereby requests that such subparagraph be changed to read as follows:

> Transportation of commodities by persons offering their services to the general public as common carriers by rail, water, motor, pipe line, or other means of conveyances and for storage

and warehousing and all other services incident thereto by persons offering their services to the general public as a public utility, rates charged for.

Dated at Washington, D. C., this 26th day of June 1942.

DAVIES WAREHOUSE COMPANY,
By L. A. BAILEY, *Its Vice President.*

REGINALD L. VAUGHAN,
Attorney for Protestant,
Mills Tower, San Francisco, California.

UNITED STATES OF AMERICA,
District of Columbia } ss.

L. A. Bailey, being first duly sworn, deposes and says that he is an officer of protestant Davies Warehouse Company, to wit, the Vice President thereof, and has signed the foregoing protest on behalf of that corporation; that said protest and the documents filed therewith were prepared in good faith; that he has read said protest and knows the contents thereof and the same is true of his own knowledge except as to the following matters which he is informed and believes to be true: that the increased rates prescribed by the Railroad Commission of the State of California in its Decision No. 35361 of May 12, 1942, were, are, and will continue to be necessary in order that protestant may continue to render adequate warehousing service to the general public.

(Sgd.) L. A. BAILEY.

Subscribed and sworn to before me this 26th day of June 1942.

[SEAL] (Sgd.) EDWIN M. LICHT,
Notary Public in and for the District of Columbia.

My commission expires June 30, 1946.

Office of Price Administration. Received June 26, 1942. Office of Secretary.

EXHIBIT "A"

Decision No. 35361

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

Application No. 24723

In the Matter of the Application of CALIFORNIA WAREHOUSE TARIFF BUREAU, L. A. Bailey, Agent, for authority to increase certain handling rates and accessorial charges of public warehouses in the City of Los Angeles, and vicinity, State of California

APPEARANCES

Arlo D. Poe, for applicant.

J. J. Deuel, for California Farm Bureau Federation, interested party.

Harry Cremeens, for Los Angeles Warehouse Co., interested party.

Gordon Ross, for Overland Terminal Warehouse Company, interested party.

I. W. Hamilton, for Pacific Commercial Warehouse, Inc., interested party.

W. H. Tyler, for Westland Warehouses, Inc., interested party.

C. O. Simpson, for Metropolitan Warehouse Co., interested party.

D. C. Fessenden, for California Warehouse Company, interested party.

Ben Smith, for Birch-Smith Storage Company, interested party.

Morris M. Cook, for Cook-McFarland Company, interested party.

A. O. Walde, for Davies Warehouse Co., interested party.

W. C. Elliott, for Bekins Van & Storage Co., interested party.

Nathan Nibley, for Jennings-Nibley Warehouse Co., Ltd., interested party.

B. F. Johnson, for Union Terminal Warehouse, interested party.

J. S. Miller, for Star Truck & Warehouse Co., interested party.

BY THE COMMISSION:

OPINION

By this application California Warehouse Tariff Bureau, through its agent, L. A. Bailey, seeks authority on behalf of its members operating in Los Angeles and vicinity to increase warehouse handling rates and certain incidental and accessorial charges, and to make the charges effective on ten days' notice.[1] No change is sought in rates for storage.

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[1] The warehousemen on whose behalf the application is filed are American Warehouse, Bekins Van Lines, Inc., Birch-Smith Storage Company, California Warehouse Co., Central Warehouse & Storage Co., H. G. Chaffee Warehouse Co., Citizens Warehouse, J. A. Clark Draying Co., Ltd., Colyear's Van & Storage Co., Cook-McFarland Warehouse Co., Davies Warehouse Company, Federal Ice & Cold Storage Co., Hollywood Storage Co., Jennings-Nibley Warehouse Co., Ltd., Los Angeles Warehouse Company, Metropolitan Warehouse Company, Modern Warehouses, Inc., Overland Terminal Warehouse Co., Pacific Coast Terminal Warehouse Company, Pacific Commercial Warehouse, Inc., Richards Trucking & Warehouse Co., Smith Bros. Truck Co., Star Truck & Warehouse Co., Union Terminal Warehouse, Western Warehouse & Transfer Co., Westland Warehouses, Inc. The

The matter was submitted at a public hearing had before Examiner Bryant at Los Angeles on February 13, 1942.

The proposed handling rates are uniformly 15 percent higher than those now in effect, subject to slight adjustments in the disposition of fractions.[2] The other incidental changes involve minimum monthly charges per customer, charges for payment of freight or express bills on outgoing shipments, and charges for sorting, weighing, clerical services, and the furnishing of special labor. The proposed increases in these charges are not uniform, but are generally in excess of 15 percent.

Applicant alleges that there has been no substantial change in the rates of the warehouses here involved since February 1, 1938; that the rates have not been sufficient to enable them to operate at a profit; that notwithstanding such condition, warehouse operating expenses have increased from time to time, particularly labor costs; that although operating revenues have recently increased due to an added volume of business, the increase has not been sufficient to offset the rise in operating expenses; and that the efficiency of public warehouse service in Los Angeles and vicinity may be seriously impaired unless applicant ware-

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warehouses are all situated in Los Angeles with the exception of Federal Ice & Cold Storage Co. and Westland Warehouses, Inc., which are located in Vernon; Hollywood Storage Co., which is located in Hollywood; and the warehouses of Bekins Van Lines, Inc., which are located in Beverly Hills, Santa Monica, Glendale, and Pasadena.

[2] The increases would be applied in accordance with a rate conversion table as set forth in Exhibit "A" to the application. The present rates and charges are published in California Warehouse Tariff Bureau Tariffs Nos. 7–C and 5–J, C. R. C. Nos. 102 and 94, respectively, of L. A. Bailey, Agent.

housemen are promptly authorized to increase rates and charges as sought herein.

Testimony in support of the application was presented by the secretary-treasurer of the Los Angeles Warehousemen's Association, by the manager of one of the applicant warehouses, and by a warehouse employee engaged to compile cost data for purposes of this proceeding. According to the testimony of these witnesses, the warehouse industry in the Los Angeles area has experienced a steady increase in operating expenses in recent years, due principally to the constant upward trend in wages for labor. Since 1938 wages have increased on four different occasions, and the employees have also been granted vacation and holiday privileges.[3] The total increase in cost to the warehouses for labor required to conduct their operations was stated to be between 20 and 26 percent. In addition, it was asserted that wages of clerical and supervisory employees have advanced, as has the cost of materials and supplies.

Studies of revenues and expenses of 14 of the 26 companies involved in this proceeding were submitted in evidence and explained by the cost witness. He stated that these 14 companies operate a major part of the warehouse space, and expressed the opinion that their figures were representative of those of all of the applicant warehousemen. The witness calculated that the labor expense alone for the warehouses studied would be $77,890 per year higher under present wage scales than under those paid in 1938, whereas additional revenue to be expected from the proposed in-

[3] Hourly wages for "regular" and "checker class" labor were 65 cents and 70 cents, respectively, on February 1, 1938. The present wage scales are 75 cents for "regular" labor and 80 to 85 cents for "checker class" labor.

crease in handling charges would be only $67,485. He asserted that the 14 warehousemen suffered a net loss from all warehouse operations of $70,571 during the first six months of 1941, despite an upward trend in their storage business and gross revenue.[4]

Subsequent to the hearing, applicant stipulated that the 1941 verified reports filed with the Commission might be considered part of the record. These reports contain a balance sheet and income statement for each warehouse. They show, among other things, that some of the warehousemen own and others rent their warehouse premises. In arriving at the loss shown above, rent paid is included in expenses. The rent paid includes an allowance for a return on the owner's investment in the property leased to an applicant and in some instances an allowance for depreciation and taxes. The warehousemen who own their buildings have no allowance for a return on their investment in their expenses. Obviously, operating expenses should not include a return on investment. At least two of applicants who rent all their warehouse buildings and who pay more than one-half of the rent paid by the 14 warehousemen, include in such rent, payments for both utility and nonutility properties. If one includes the rent received in revenues, the 14 warehousemen did not, in 1941, operate at a loss. In subsequent proceedings we will expect applicants to segregate their rent expenses in a manner so that we can determine the amount which represents a return on the investment in leased premises and the amount which represents operating expenses such as taxes and depreciа-

[4] During the same period in 1940 the loss was said to have been $85,064. The operating losses have been compensated by nonoperating revenues, so that the warehouses as a group have shown some net income.

tion, and we should also have evidence showing the cost of the premises leased.

No one appeared in opposition to the granting of this application, although over 3,000 notices of the proposed rate increases were said to have been distributed to customers of the warehousemen.

The order herein will permit applicants to increase their rates to reimburse them in part for their added labor expense. This will be done, however, subject to the condition that applicant, before accepting the benefits of this order, and before filing the increased rates authorized herein, will be required to agree that it will never urge before this Commission, in any reparation proceeding under Section 71 of the Public Utilities Act, or in any other proceeding, that the opinion and order herein has found that any individual rate is reasonable. It will be understood that any interested party may properly challenge by complaint and in the usual manner the reasonableness or lawfulness of any individual increases herein authorized, should such increases be regarded as unreasonable or in any other manner unlawful.

ORDER

This matter having been duly heard and submitted,

IT IS HEREBY ORDERED that California Warehouse Tariff Bureau be and it is hereby authorized on behalf of the warehousemen specifically named in the preceding opinion, subject to the condition set forth in said opinion, to establish on not less than ten (10) days' notice to the Commission and to the public, increased handling rates and incidental charges as set forth in Exhibits A and B attached to and made a part of the above-entitled application.

The authority herein granted is void unless exercised within ninety (90) days from the effective date hereof.

The effective date of this order shall be ten (10) days from the date hereof.

Dated at San Francisco, California, this 12th day of May 1942.

RAY L. RILEY,
C. C. BAKER,
FRANK R. HAVENNER,
RICHARD SACHSE,
Commissioners.

Certified as a true copy:

[SEAL] H. G. MATHEWSON,
Secretary, Railroad Commission, State of California.

EXHIBIT "B"

UNITED STATES OF AMERICA,
District of Columbia, ss:

L. A. BAILEY, being first duly sworn, deposes and says that his post office address is 216 Pine Street, San Francisco, California; that his occupation is President and Executive Manager of Pacific States Cold Storage Warehousemen's Association, Secretary of California Warehousemen's Association, Secretary of the Warehousemen's Association of the Port of San Francisco, Tariff Agent of the Los Angeles Warehousemen's Association as well as the Tariff Agent for numerous public utility warehousemen operating within the State of California; that his business connection with protestant is that of Vice President and warehouse Tariff Agent; that the evidence, the presentation of which is subject to the control of the protestant and upon which the protestant relies in support of the facts alleged in the protest, consists of the allegations contained in the protest to the effect that:

(a) protestant is a public utility warehouseman as defined by and under the Constitution of the State of California and the Public Utilities Act of California and, as such public utility, is subject to the jurisdiction and control of the Railroad Commission of the State of California with respect to its rates and charges as well as with respect to its services to the public generally;

(b) protestant is subject to the burdens of the laws of the State of California and is entitled to the benefits thereof;

(c) under and by virtue of Decision No. 35361 of the Railroad Commission of the State of California,

of May 12, 1942, in Application No. 24723, your protestant was authorized to increase its charges for handling and certain minor accessorial services rendered by it as a public utility;

(d) such increased charges became effective on June 1, 1942, and have been since that date and are the charges which your petitioner is assessing and collecting for such services, except for minor modifications authorized by the California Railroad Commission;

(e) such increased charges were and are necessary by reason principally of increased cost of labor as alleged in said protest;

(f) the warehousing services of your protestant are demanded in the public interest, particularly during the War Emergency period;

(g) it is in the public interest that protestant's warehousing services be maintained in full vigor which would be put in jeopardy unless protestant is allowed to continue in effect the rates as authorized in said Decision No. 35361;

(h) because the rates and charges of protestant are regulated by the Railroad Commission of the State of California they cannot be considered to be inflationary, particularly as to the aforesaid increased charges authorized by said Decision No. 35361 and, furthermore, except for minor modifications the rates and charges for warehousing services of protestant prior to the increases authorized and established under said Decision 35361, the rates and charges were those published and filed with the Commission and effective since the early part of 1938;

(i) said increased charges are and will be necessary in order that your protestant may continue to render adequate warehousing service to the general public and that unless protestant is permitted to main-

tain its present general basis of rates and charges for handling services in connection with the storage of commodities at its warehouses it will be confronted with serious financial difficulties that will be adverse to the best interests of its public service.

The facts set forth in (a) to (h) above are within the personal knowledge of affiant whereas the facts set forth in (i) above are based upon information and belief.

Affiant has been tariff publishing agent for protestant and many other public utility warehousemen in California for over 15 years and the sources of his knowledge of facts (a) to (i) inclusive above are based upon what he has learned as such tariff agent. Your affiant bases his knowledge upon his general knowledge and is not able to state in detail the sources of his information as to each fact heretofore alleged.

(Sgd.) L. A. BAILEY.

Subscribed and sworn to before me this 26th day of June 1942.

[SEAL] (Sgd.) EDWIN M. LICHT,
Notary Public in and for the District of Columbia.

My commission expires June 30, 1946.

EXHIBIT "C"

UNITED STATES OF AMERICA,
District of Columbia, ss:

L. A. BAILEY, being first duly sworn deposes and says that he is making this affidavit on behalf of protestant and as Vice President thereof and that the purpose of this affidavit is to comply with the requirements of Rule 15 (b) of Procedural Regulation No. 1 of the Office of Price Administration; that the further evidence upon which he believes he can rely in support of the facts alleged in the protest and which is not subject to his control but which he believes to be true relates:

(a) to the allegations contained in said protest to the effect that all warehousemen who are under the jurisdiction and control of the Railroad Commission of the State of California (under and by virtue of Sections 2 (dd) and 2½ of the Public Utilities Act of California, and Section 33 of Article IV and Section 23 of Article XII of the Constitution of California) are public utilities in the same general class of business as protestant, and

(b) to all allegations of fact contained in said protest other than the allegations in (a) above and the facts set forth in the affidavit of affiant attached to the protest as Exhibit "B".

(Sgd.) L. A. BAILEY.

Subscribed and sworn to before me this 26th day of June 1942.

[SEAL] (Sgd.) EDWIN M. LICHT,
Notary Public in and for the District of Columbia.
My commission expires June 30, 1946.

[ORDER DENYING PROTEST]

UNITED STATES OF AMERICA

BEFORE THE OFFICE OF PRICE ADMINISTRATION

Docket No. GF1–428–P

In the Matter of

DAVIES WAREHOUSE COMPANY, PROTESTANT

ORDER DENYING PROTEST

On June 26, 1942, Davies Warehouse Company, a California corporation of 126 South Central Avenue, Los Angeles, California, filed a Protest against the provisions of the General Maximum Price Regulation. Due consideration has been given to the Protest, and an opinion in support of this Order has been issued simultaneously herewith and filed with the Division of the Federal Register.

For the reasons set forth in the opinion, under the authority vested in the Price Administrator and in accordance with the Emergency Price Control Act of 1942 and Procedural Regulation No. 1, it is ordered that Protest No. GF1–428–P be, and it hereby is, denied.

Issued and effective this 27 day of July 1942.

(Sgd.) LEON HENDERSON,
Leon Henderson,
Administrator.

[OPINION]

UNITED STATES OF AMERICA

BEFORE THE OFFICE OF PRICE ADMINISTRATION

Docket No. GF1-428-P

In the Matter of

DAVIES WAREHOUSE COMPANY, PROTESTANT

OPINION ACCOMPANYING ORDER DENYING PROTEST

On June 26, 1942, Davies Warehouse Company, a California corporation, herein called Protestant, filed a Protest to the General Maximum Price Regulation, to Supplementary Regulation No. 11 thereto, and to Amendment No. 1 to said Supplementary Regulation No. 11. The General Maximum Price Regulation, in substance, prohibits sales of all but certain excepted commodities and services at prices higher than those charged by the seller during March. Supplementary Regulation No. 11 provides that the General Maximum Price Regulation should not apply to certain listed services, among them, "commercial storage and warehousing and services incident thereto" until July 1, 1942. Amendment No. 1 to Supplementary Regulation No. 11 provides for exception of certain services from the General Maximum Price Regulation, but states expressly that "charges for storage and warehousing and all other services incident thereto by any person shall not be excluded from the General Maximum Price Regulation."

Protestant alleges that it is a "public utility" within the meaning of Section 302 (e) (2) of the Emergency

Price Control Act of 1942 and that it is therefore not subject to the provisions of the General Maximum Price Regulation. Section 302 (c) (2) exempts from regulation "rates charged by any common carrier or other public utility." Protestant's position is predicated upon the inclusion of a warehouseman in the term "public utility" as defined in Section 2 (dd) of the California Public Utilities Act (Statutes of California, 1915, Chapter 91, as amended) and the declaration in Article XII, section 23 of the California Constitution that any private corporation furnishing storage facilities to the public is a public utility. Disposition of this protest, therefore, depends entirely upon the construction of the phrase "public utility" as used in Section 302 of the Price Control Act.

The Administrator has heretofore exempted from the General Maximum Price Regulation those businesses which are universally regarded as public utilities and which are regulated as such in most states. Protestant does not contend that all public warehouses are entitled to similar exemption as "public utilities." Nor could it do so, since it is clear that the Act was intended to apply to warehouses. Section 302 (c) defines the term "commodity" as including "services rendered * * * in connection with the * * * storage * * * of a commodity." If the Price Administrator had no authority to establish maximum prices for public warehousemen this provision would be rendered in large part meaningless, since the bulk of "storage" services is rendered by public warehousemen.

Protestant's contention is that it and similar storage companies in California are "public utilities" within the meaning of the Act, by virtue of the fact that they are so designated by the statutes and Constitution of that state. However, the fact that Protestant is

engaged in a business which is described as that of a "public utility" by the Constitution and laws of the State of California is not controlling in determining the proper construction of the phrase "public utility" as used in Section 302 of the Emergency Price Control Act. That statute is nation-wide in application and must of necessity be interpreted so as to authorize uniform exercise of the authority vested in the Price Administrator with respect to any given industry in every part of the country. Section 302 (c) (2) is unqualified and contains no indication, either express or implied, that the exemption is to extend to certain classes of business in one state but not in another, depending on the existence and scope of local regulation. This is particularly significant so far as warehouses are concerned, since many states exercise no regulation over warehouses, others only require licenses, still others prescribe varying degrees of control over rates and services, while only a very few subject them to regulation as public utilities in the full sense of the term.

It does not follow, however, that the Administrator may not give appropriate consideration to the determinations of state regulatory agencies in passing upon applications for adjustment of particular maximum prices. In this connection it should be noted that the protestant and certain other California warehousemen have also filed petitions for amendment under section 19 of the General Maximum Price Regulation requesting *inter alia* that their maximum prices be increased to levels theretofore approved by the California Railroad Commission, after extensive public hearings.

The Price Administrator is now considering these petitions on the basis of the showing made therein and in the light of the fact that the California Railroad

Commission has approved the rate increases requested.

For the foregoing reasons this protest should be denied.

Issued and effective this 27th day of July, 1942.

(Sgd.) LEON HENDERSON,
Leon Henderson,
Administrator.

481910—42——3

THE GENERAL MAXIMUM PRICE REGULATION*

Findings of the Price Administrator

In the judgment of the Price Administrator the prices of commodities and services generally have risen and are threatening further to rise to an extent and in a manner inconsistent with the purposes of the Emergency Price Control Act of 1942.

In the judgment of the Price Administrator the maximum prices established by this Regulation, which apply with certain exceptions to all commodities and services not otherwise subject to regulation, are generally fair and equitable and are necessary to check inflation and to effectuate the purposes of the Act.

So far as practicable the Price Administrator gave due consideration to prices prevailing between October 1 and 15, 1941, and to relevant factors of general applicability. So far as practicable the Price Administrator consulted with representatives of trade and industry.

A statement of the considerations involved in the issuance of this Regulation is issued simultaneously herewith.

Therefore, under the authority vested in the Price Administrator by the Emergency Price Control Act of 1942, this General Maximum Price Regulation is hereby issued.

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*Issued April 28, 1942 (7 F. R. 3153). Corrected, 7 FR 3330; as amended, 7 FR 3666, 3990, 3991, 4339, 4487, 4659, 4738, 5027, 5192, 5276, 5365, 5445, 5484, 5565, 5775, 5784, 5783, 6058, 6081, 6216.

Maximum prices

Note: The meaning of certain provisions and terms of this Regulation is further explained and defined in Section 20. The explanations and definitions are set forth in alphabetical order. The terms explained and defined are underlined the first time they appear in the text.

§ 1 [§ 1499.1] *Prohibition against dealing in commodities or services above maximum prices.* On and after the effective date of this Regulation, regardless of any contract or other obligation:

(a) No person shall sell or deliver any commodity, and no person shall sell or supply any service, at a price higher than the maximum price permitted by this Regulation; and

(b) No person in the course of trade or business shall buy or receive any commodity or service at a price higher than the maximum price permitted by this Regulation.

(c)[1] The provisions of paragraph (b) of this section shall not be applicable to any war procurement agency or any contracting or paying finance officer thereof and any such agency or contracting or paying finance officer shall be relieved of any and every liability, civil or criminal, imposed by this General Maximum Price Regulation or by the Emergency Price Control Act of 1942. "War procurement agency" as used in this paragraph, includes the War Department, the Department of the Navy, the United States Maritime Commission, and the Lend-Lease Section of the Procurement Division of the Treasury Department, or any agency of any of the foregoing.

§ 2 [§ 1499.2] *Maximum prices for commodities and services: general provisions.* Except as otherwise pro-

[1] Added by Amdt. No. 7, 6-19-42, 7 FR 4659.

vided in this Regulation, the seller's maximum price for any commodity or service shall be:

(a) *In those cases in which the seller dealt in the same or similar commodities or services during March 1942:*

The highest price charged by the seller during such month—

(1) For the same commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it; or

(b) *In those cases in which the seller did not deal in the same or similar commodities or services during March 1942:*

The highest price charged during such month by the most closely competitive seller of the same class—

(1) For the same commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it.

"Highest price charged during March 1942"

For the purposes of this Regulation, the highest price charged by a seller "during March 1942" shall be:

(1) The highest price which the seller charged for a commodity delivered or service supplied by him during March 1942; or

(2) If the seller made no such delivery or supplied no such service during March 1942 his highest offering price for delivery or supply during that month.

No seller shall change his customary allowances, discounts or other price differentials unless such change results in a lower price. The "highest price charged" shall be a price charged during March 1942 to a pur-

chaser of the same class. But if during March 1942 a seller (a) had an established practice of making allowances, discounts or price differentials to different classes of purchasers, and (b) raised his general level of prices, but thereafter during March 1942 made no delivery to any purchaser of a particular class, he shall, for that particular class of purchasers calculate the highest price charged by taking the highest price charged during March 1942 to a purchaser of another class and then adjusting such price to reflect his established allowances, discounts and price differentials. No seller shall require any purchaser, and no purchaser shall be permitted, to pay a larger proportion of transportation costs incurred in the delivery or supply of any commodity or service, than the seller required purchasers of the same class to pay during March 1942 on deliveries or supplies of the same or similar types of commodities or services.

"Similar commodities or services"

One commodity shall be deemed "similar" to another commodity, if the first has the same use as the second, affords the purchaser fairly equivalent serviceability, and belongs to a type which would ordinarily be sold in the same price line. In determining the similarity of such commodities, differences merely in style or design which do not substantially affect use, or serviceability, or the price line in which such commodities would ordinarily have been sold, shall not be taken into account. One service shall be deemed "similar" to another service if the first has the same use and purpose as the second and belongs to a type which would ordinarily be sold for the same or substantially the same price.

Special provisions

The maximum prices established by this section for certain commodities or services or in certain transactions may be modified by supplementary regulation issued under this section.[2]

§ 3 [§ 1499.3] *Maximum prices for commodities which cannot be priced under section 2.* The seller's maximum price for a commodity which cannot be priced under section 2 of this Regulation shall be a maximum price in line with the level of maximum prices established by this Regulation. Such price shall be determined by the seller in accordance with the following procedures:

(a) *Sales at wholesale or retail.* In the case of a sale at wholesale or retail, the seller (1) shall select from the same general classification and price range as the commodity being priced under this section, the comparable commodity for which a maximum price is established under section 2 of this Regulation and of which the seller delivered the largest number of units during March 1942; (2) shall divide his maximum price for that commodity by his replacement cost of that commodity; and (3) shall multiply the percentage so obtained by the cost to him of the commodity being priced under this paragraph. The resulting figure shall be the maximum price of the commodity being priced. Within ten days after determining such maximum price under this paragraph, the seller shall report such price to the appropriate field office of the Office of Price Administration upon a form, duly filled out and signed under oath or affirmation, copied from the form contained in Appendix A of this Regulation.

[2] Heading and paragraph added by Amdt. No. 15, 7-15-42, 7 FR 5484.

The price so reported shall be subject to adjustment at any time by the Office of Price Administration.

(b) *Sales other than at wholesale or retail.* In the case of a sale other than at wholesale or retail, the maximum price shall be a price determined by the seller after specific authorization from the Office of Price Administration. A seller who seeks an authorization to determine a maximum price under the provisions of this paragraph shall file with the Office of Price Administration in Washington, D. C., an application setting forth (1) a description in detail of the commodity for which a maximum price is sought; and (2) a statement of the facts which differentiate such commodity from other commodities delivered during March 1942 by such seller and by other competitive sellers of the same class. If such authorization is given, it will be accompanied by instructions as to the method for determining the maximum price. Within ten days after such price has been determined, the seller shall report the price to the Office of Price Administration in Washington, D. C., upon a form, duly filled out and signed under oath or affirmation, which will be furnished him. The price so reported shall be subject to adjustment at any time by the Office of Price Administration.

§ 4 [§ 1499.4] *Supplemental Regulations.* If the maximum prices established for any commodity under the provisions of this Regulation fail equitably to distribute returns from the sale at retail of such commodity among producers, manufacturers, wholesalers and retailers, the Price Administrator will by supplementary regulation establish such maximum prices for different classes of sellers, or fix such base periods for the determination of their maximum prices, as will insure that each such class of sellers shall receive a fair share of such return.

§ 4a [§ 1499.4a] [3] *Determination of maximum prices by sellers at retail operating more than one retail establishment.* A seller who owns more than one establishment selling commodities at retail and who has had a fixed practice, which prevailed during March 1942, of selling commodities at retail at uniform or at substantially uniform prices in all such establishments or in all such establishments located in a particular area may make written application to the Office of Price Administration, Retail Trade and Services Division, Washington, D. C., for authorization to determine and use uniform maximum prices under this General Maximum Price Regulation in all of such establishments in which it has been the practice to charge uniform or substantially uniform prices. Such application shall state (a) the name and address of the principal office of the seller; (b) the number of separate retail establishments owned by the seller and the address of each such establishment; (c) the kind of merchandise carried in such retail establishments; (d) whether commodities are purchased centrally by the seller and distributed by the seller to such retail establishments or are purchased separately by such establishments; (e) a description of the fixed practice of the seller of selling commodities at uniform or substantially uniform prices in all such retail establishments or in all such retail establishments located in particular areas indicating the length of time during which such practice has been in effect and whether uniform selling prices are determined in a central office; (f) the names and addresses of the seller's most closely competitive sellers of the same class on a national or regional basis; and (g) any other facts which the seller wishes to submit in support

[3] Added by Amdt. No. 12, 7-11-42, 7 FR 5365.

of the application. If such authorization is given, it will be accompanied by instructions as to the method by which the seller may determine and use uniform maximum prices under this General Maximum Price Regulation.

§ 4b [§ 1499.4b] [1] *Adjustment of maximum prices in cases of special deals.* Any seller, other than a seller at retail, whose maximum price for a commodity to purchasers of a particular class is based on a "special deal" given by him to such purchasers which he can demonstrate was to have terminated not more than 123 days from the date on which it first became effective, may adjust his maximum price to such purchasers to the highest price at which such commodity was delivered by him to a purchaser of that class during the 30 days immediately preceding the date on which the special deal first became effective.

A seller at retail whose maximum price for a commodity to purchasers of a particular class is based on a special deal given by him to such purchasers as the result of a special deal given to him by his supplier may adjust his maximum price to such purchasers to the highest price at which such commodity was delivered by him to a purchaser of that class during the 30 days immediately preceding the date on which the special deal given by him first became effective. Such adjusted maximum price shall not apply to the particular commodities purchased by the retailer under the special deal given to him by his supplier.

The words "special deal," as used in this section, mean any reduction in the price of a commodity to purchasers of a particular class from the price in effect for purchasers of that class on the day immediately preceding the date on which the special deal first

[1] Added by Amdt. No. 14, 7-17-42, 7 FR 5565.

became effective, including but not limited to a reduction in such price resulting from offers of free goods, combination sales, and increased quantity and other discounts to purchasers of such class.

A seller who makes an adjustment in his maximum price pursuant to this section shall, within 10 days thereafter, submit a statement to the regional office of the Office of Price Administration for the region in which the seller's place of business is located, except that if the seller makes sales of the commodity in more than one region, the statement shall be submitted to the Office of Price Administration, Washington, D. C. Such statement shall set forth:

(a) The seller's maximum price for the commodity prior to the adjustment permitted by this section;

(b) A description of the special deal given by the seller including all the terms thereof, the class or classes of purchasers to which it was applicable, the dates during which it was in effect, and copies of price lists, advertisements and trade announcements pertaining to such special deal;

(c) In the case of a seller at retail, a description of the special deal given to him by his supplier including all the terms thereof, the dates during which it was in effect and copies of price lists and trade announcements pertaining to such special deal;

(d) In the case of a seller other than a seller at retail, detailed evidence demonstrating that the special deal was to have terminated on or before a date not more than 123 days from the date on which the special deal first became effective;

(e) The adjusted maximum price established by the seller pursuant to this section; and

(f) A description of all prices and terms of payment which the seller has had in effect for the commodity since January 1, 1941.

The adjusted maximum price reported by the seller pursuant to this section shall be subject to adjustment at any time by the Office of Price Administration.

§ 5 [§ 1499.5] *Transfers of business or stock in trade.* If the business, assets or stock in trade of any business are sold or otherwise transferred after April 28, 1942, and the transferee carries on the business, or continues to deal in the same type of commodities or services, in an establishment separate from any other establishment previously owned or operated by him, the maximum prices of the transferee shall be the same as those to which his transferor would have been subject if no such transfer had taken place, and his obligation to keep records sufficient to verify such prices shall be the same. The transferor shall either preserve and make available, or turn over, to the transferee all records of transactions prior to the transfer which are necessary to enable the transferee to comply with the record provisions of this Regulation.

§ 6 [§ 1499.6] *Sales for export.* The maximum price at which a person may export any commodity shall be determined in accordance with the provisions of the Maximum Export Price Regulation issued by the Office of Price Administration on April 25, 1942.

§ 7 [§ 1499.7][5] *Federal and state taxes.* Any tax upon, or incident to, the sale, delivery, processing, or use of a commodity, or the supplying of a service, imposed by any statute of the United States or statute or ordinance of any state or subdivision thereof, shall be treated as follows in determining the seller's maximum price for such commodity or service and in preparing the records of such seller with respect thereto:

(a) *As to a tax in effect during March 1942.* (1) If the seller paid such tax, or if the tax was paid by

[5] Amended by Amdt. No. 7, 6–19–42, 7 FR 4659.

any prior vendor, irrespective of whether the amount thereof was separately stated and collected from the seller, but the seller did not customarily state and collect separately from the purchase price during March 1942 the amount of the tax paid by him or tax reimbursement collected from him by his vendor, the seller may not collect such amount in addition to the maximum price, and in such case shall include such amount in determining the maximum price under this General Maximum Price Regulation.

(2) In all other cases if, at the time the seller determines his maximum price, the statute or ordinance imposing such tax does not prohibit the seller from stating and collecting the tax separately from the purchase price, and the seller does state it separately, the seller may collect, in addition to the maximum price, the amount of the tax actually paid by him or an amount equal to the amount of tax paid by any prior vendor and separately stated and collected from the seller by the vendor from whom he purchased, and in such case the seller shall not include such amount in determining the maximum price under this General Maximum Price Regulation.

(b) *As to a tax or increase in a tax which becomes effective after March 31, 1942.* If the statute or ordinance imposing such tax or increase does not prohibit the seller from stating and collecting the tax or increase separately from the purchase price, and the seller does separately state it, the seller may collect, in addition to the maximum price, the amount of the tax or increase actually paid by him or an amount equal to the amount of tax paid by any prior vendor and separately stated and collected from the seller by the vendor from whom he purchased.

§ 8 [§ 1499.8] *Less than maximum prices.* Lower prices than those established by this Regulation may be charged, demanded, paid or offered.

Commodities and services excepted from this regulation

§ 9 [§ 1499.9] *Commodities excepted from this General Maximum Price Regulation.* (a) This General Maximum Price Regulation shall not apply to sales or deliveries of the following commodities:

(1) Any raw and unprocessed agricultural commodity or greenhouse commodity while it remains in substantially its original state, except that dried fruits and dried berries (other than dried prunes and other than sales or deliveries "in natural condition" by growers to packers), bananas, and dried imported agricultural commodities, shall be governed by this General Maximum Price Regulation.[6]

(2) Eggs and poultry.

(3) All milk products, including butter, cheese, condensed and evaporated milk, except that fluid milk sold at wholesale and [6a] retail, cream sold at wholesale and [6] retail, and ice cream shall be governed by this General Maximum Price Regulation.

(4) Flour, cake mixes, and flour mixes, except that packaged cake mixes and flour mixes shall be governed by this General Maximum Price Regulation.[7]

(5) Mutton and lamb.

(6) Fresh fish and seafood, and game.

(7)[8] Dried prunes, dry edible beans, leaf tobacco (whether dried or green), all nuts and peanuts, except cleaned or raw shelled peanuts harvested from the

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[6] Amended by Amdt. No. 4, issued 6-5-42, 7 FR 4339.

[6a] Words "wholesale and" added by Amdt. No. 21, 8-1-42, 7 FR 6007.

[7] Amended by Amdt. No. 2, issued 5-27-42, 7 FR 3990.

[8] Amended by Amdt. No. 16, 7-24-42, 7 FR 5775.

1941 crop, all salted peanuts and peanut butter, linseed oil, linseed cake and linseed meal, manure and mixed feed for animals, except that cat and dog foods shall be governed by this General Maximum Price Regulation.

(8) Living animals, whether wild or domestic.

(9) Books, magazines, motion pictures, periodicals, newspapers, and materials furnished for publication by any press association or feature service.

(10) Domestic ores and ore concentrates.

(11) Stumpage, logs, and pulpwood.

(12) Stamps and coins; precious stones and mountings into which precious stones are set;[9] antiques and knotted oriental rugs; paintings, etchings, sculptures and other objects of art.

(13) Used automobiles.

(14) Wood and gum for naval stores and gum naval stores.[10]

(15) Securities.

(16) Such other commodities as may be specified by supplementary regulations issued under this section.

(b) This Regulation shall not apply to the following sales or deliveries:

(1) By a farmer, of commodities grown and processed on his farm, if the total of such sales or deliveries does not exceed $75 in any one calendar month.

(2) By any merchant, farmer, artisan, or person who renders professional services, of his used supplies, or business, farm, or professional equipment, not acquired or produced by him for the purpose of sale.

(3) By an owner, of his used personal or household effects or other personal property used by him.

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[9] Words following "precious stones" added by Amdt. No. 9, 6-30-42, 7 FR 5027.

[10] Amended by Amdt. No. 5, 6-12-42, 7 FR 4487.

(4) At a bona fide auction of used household or personal effects.

(5) By hotels, restaurants, soda fountains, bars, cafes, or other similar establishments, of food or beverages prepared and sold for consumption on the premises.

(6) By a breeder, trapper, or hunter, of pelts, furs, or other parts of wild animals raised by him, or trapped, shot, or killed by him, if the total of such sales or deliveries does not exceed $75 in any one calendar month.

(7) Of commodities sold without private profit in the course of any sale, fair, or bazaar conducted for a period of not more than 15 days by any religious, charitable, or philanthropic organization.

(8) To the United States or any agency thereof of such commodities or in such transactions as may be specified by supplementary regulations issued under this section.

(9) Such other sales and deliveries as may be specified by supplementary regulations issued under this section.

§ 10 [§ 1499.10] [11] *Services excepted from this General Maximum Price Regulation.* The provisions of this General Maximum Price Regulation shall not apply to such services as may be specified by supplementary regulations issued under this section or by any amendments thereto.

Records

§ 11 [§ 1499.11] *Base-period records.* Every person selling commodities or services for which, upon sale by that person, maximum prices are established by this Regulation, shall:

[11] Amended by Amdt. No. 8, 6-23-42, 7 FR 4738.

(a) Preserve for examination by the Office of Price Administration all his existing records relating to the prices which he charged for such of those commodities or services as he delivered or supplied during March 1942, and his offering prices for delivery or supply of such commodities or services during such month; and

(b) Prepare, on or before July 1, 1942, on the basis of all available information and records, and thereafter keep for examination by any person during ordinary business hours, a statement showing:

(1) The highest prices which he charged for such of those commodities or services as he delivered or supplied during March 1942 and his offering prices for delivery or supply of such commodities or services during such month, together with an appropriate description or identification of each such commodity or service; and

(2) All his customary allowances, discounts, and other price differentials.

Any person, other than a person selling at retail, who claims that substantial injury would result to him from making such statement available to any other person, may file it with the appropriate field office of the Office of Price Administration. The information contained in such statement will not be published or disclosed unless it is determined that the withholding of such information is contrary to the purposes of this Regulation.

§ 12 [§ 1499.12] *Current records.* Every person selling commodities or services for which, upon sale by that person, maximum prices are established by this Regulation shall keep, and make available for examination by the Office of Price Administration, records of the same kind as he has customarily kept, relating to the prices which he charged for such of those com-

modities or services as he sold after the effective date of this Regulation; and, in addition, records showing, as precisely as possible, the basis upon which he determined maximum prices for those commodities or services.

§ 13 [§ 1499.13] *Maximum prices of cost-of-living commodities: statement, marking or posting.* For the purposes of this section, a cost-of-living commodity is any commodity designated as such by the Price Administrator. A list of the classes of commodities so designated appears in Appendix B of this Regulation.

(a) On and after May 18, 1942, every person offering to sell a cost-of-living commodity at retail shall mark the maximum price of such commodity in a manner plainly visible to, and understandable by, the purchasing public. The maximum price may be marked on the commodity itself or on the shelf, bin, rack, or other holder or container upon or in which the commodity is kept, or it may be posted at the place in the business establishment where the commodity is offered for sale. Provided,[11a] That whichever of the above methods of posting is adopted, the maximum price of each commodity offered for sale shall be plainly visible to the purchaser at the place in the business establishment where the commodity is offered for sale, and shall not be obscured by the posted prices of other commodities, whether by use of price books or catalogues or layers of price lists or otherwise or in any other manner. The maximum price shall be stated as follows: "Ceiling Price $—.—;" or "Our Ceiling $—.—." Any person choosing to post by price-lines the maximum prices of commodities in the classifications marked by asterisks in Appendix B shall post the maximum price by price-line at the place in the

[11a] Proviso added by Amdt. No. 18, 7-25-42, 7 FR 5783.

business establishment where the commodities in such price-line are offered for sale, and, in addition, shall mark the selling price of each such commodity on the commodity itself.

(b) On or before July 1,[12] 1942, every person offering to sell cost-of-living commodities at retail shall file with the appropriate War Price and Rationing Board of the Office of Price Administration a statement showing his maximum price for each such commodity, together with an appropriate description or identification of it. Such statement shall be kept up to date by such person by filing on the tenth[13] day of every succeeding month a statement of his maximum price for any cost-of-living commodity newly offered for sale during the previous month, together with an appropriate description or identification of the commodity.

§ 14 [§ 1499.14] *Sales slips and receipts.* Any seller who has customarily given a purchaser a sales slip, receipt, or similar evidence of purchase shall continue to do so. Upon request from a purchaser any seller, regardless of previous custom, shall give the purchaser a receipt showing the date, the name and address of the seller, the name of each commodity or service sold, and the price received for it.

Registration and enforcement

§ 15 [§ 1499.15] *Registration.*—Every person selling at wholesale, and every person who owns, or hereafter becomes the owner of, any business operating an establishment selling at retail any commodity or service for which a maximum price is established by this General Maximum Price Regulation or by any other

[12] Amdt. No. 1, issued 5-12-42, 7 FR 3666, changed "June 1" to "July 1."

[13] Amended by Amdt. No. 11, 7-6-42, 7 FR 5192.

price regulation of the Office of Price Administration shall register with the Office of Price Administration[14] at such time and in such manner as the Administrator may hereafter by regulation prescribe, on forms which will be made available by the Office of Price Administration.

§ 16 [§ 1499.16] *Licensing.* Every person selling at wholesale or retail any commodity or service for which a maximum price is established by the General Maximum Price Regulation or by any other price regulation of[15] the Office of Price Administration is by the General Maximum Price Regulation granted a license as a condition of selling any such commodity or service. The provisions of the General Maximum Price Regulation and of every price regulation of the Office of Price Administration to which this section now is or may hereafter become applicable shall be deemed to be incorporated in the license hereby granted, and any violation of any provision so incorporated shall be a violation of the provisions of said license.[15a] Such license shall be effective on the effective date of the General Maximum Price Regulation or when any such person becomes subject to the maximum price provisions of this or any other price regulation, and shall, unless suspended in accordance with the provisions of the Emergency Price Control Act of 1942, remain in effect as long as such regulation, or any applicable part, amendment, or supplement remains in effect.

§ 17 [§ 1499.17] *Penalties.* Persons violating any provision of this Regulation are subject to the criminal penalties, civil enforcement actions, and suits for treble damages provided for by the Emergency Price

[14] Amended by Amdt. No. 7, 6-19-42, 7 FR 4659.
[15] Amended by Amdt. No. 7, 6-19-42, 7 FR 4659.
[15a] Sentence added by Amdt. No. 20, 8-4-42, 7 FR 6084.

Control Act of 1942, and proceedings for the suspension of licenses.

Procedure for adjustment or amendment

§ 18 [§ 1499.18] [16] *Applications for adjustment.*— (a) The Office of Price Administration, or any duly authorized officer thereof, may by order adjust the maximum price established under this General Maximum Price Regulation for any seller at retail in any case in which such seller shows:

(1) That such maximum price is abnormally low in relation to the maximum prices of the same or similar commodities established for other sellers at retail; and

(2) That this abnormality subjects him to substantial hardship.

Applications for adjustment under this paragraph (a) shall be filed in accordance with Temporary Procedural Regulation No. 2.

(b) The Office of Price Administration, or any duly authorized officer thereof, may by order adjust the maximum price established under this General Maximum Price Regulation for any seller other than a seller at retail in any case in which such seller shows:

(1) That such maximum price causes him substantial hardship and is abnormally low in relation to the maximum prices established for competitive sellers of the same or similar commodities; and

(2) That establishing for him a maximum price bearing a normal relation to the maximum prices established for competitive sellers of the same or similar commodities, will not cause or threaten to cause an increase in the level of retail prices.

Applications for adjustment under this paragraph (b) shall be filed in accordance with Procedural Regulation No. 1.

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[16] Amended by Amdt. No. 10, 7-9-42, 7 FR 5276.

(c) Any person seeking relief, for which no provision is made in the foregoing paragraphs (a) and (b) of this section, from a maximum price established under this General Maximum Price Regulation may present the special circumstances of his case in an application for an order of adjustment. Such an application shall be filed in accordance with Procedural Regulation No. 1 and shall set forth the facts relating to the hardship to which such maximum price subjects the applicant together with a statement of the reasons why he believes that the granting of relief in his case and in all like cases will not defeat or impair the policy of the Emergency Price Control Act of 1942 and of this General Maximum Price Regulation to eliminate the danger of inflation.

This section shall apply to all maximum price regulations which have incorporated § 1499.18 in their provisions.

§19 [§ 1499.19] *Petitions for amendment.* Any person seeking a modification of any provision of this Regulation, or an adjustment not provided for in section 18 of this Regulation, may file a petition for amendment in accordance with the provisions of Procedural Regulation No. 1 issued by the Office of Price Administration.

Definitions and explanations

§ 20 [§ 1499.20] *Definitions and explanations.* This General Maximum Price Regulation, and the terms appearing therein, unless the context otherwise requires, shall be construed as follows:

(a) *Appropriate Field Office of the Office of Price Administration.* "Appropriate field office of the Office of Price Administration" means the district office for the district (or in the absence of such district office, the state office for the State) in which is

located the seller's place of business from which his sales are made.

(*b*) *Appropriate War Price and Rationing Board.* "Appropriate War Price and Rationing Board" means the War Price and Rationing Board for the area in which is located the seller's place of business from which the cost-of-living commodities are offered for sale.

(*c*) *Commodity.* "Commodity" includes commodities, articles, products, and materials and contracts to buy, sell, or deliver any of the foregoing.[17]

(*d*) *Delivered.* A commodity shall be deemed to have been "delivered" during March 1942, if during such month it was received by the purchaser or by any carrier, including a carrier owned or controlled by the seller, for shipment to the purchaser.

(*e*) *Establishment Selling at Retail.* Establishment refers to the physical location of the store, shop, or other place of business in which commodities or services are sold. Any such establishment shall be deemed to be selling at retail if it has an established practice of making sales at retail.

(*f*) *Mixed Feed.* "Mixed feed" includes a mixture or blend of more than one feed ingredient for the purpose of feeding animals, except screenings as defined in the Official Publication of the Association of American Feed Control Officials Incorporated for 1942 and except a mixed feed resulting from the blending or mixing of offals or byproducts from a single vegetable, plant or other agricultural products.[18]

(*g*) *Most Closely Competitive Seller of the Same Class.* "Seller of the same class" means a seller (1)

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[17] Words "but does not include real property" stricken by Amdt. No. 8, 6-23-42, 7 FR 4738.

[18] Amended by Amdt. No. 7, 6-19-42, 7 FR 4659.

performing the same function (for example, manufacturing, distributing, retailing, processing, storing, installing, or repairing), (2) of similar type (for example, department store, mail order house, chain store, specialty shop, cut-rate store), (3) dealing in the same type of commodities or services, and (4) selling to the same class of purchaser. A seller's "most closely competitive seller of the same class" shall be a seller of the same class who (a) is selling the same or a similar commodity or service [19] and (b) is closely competitive in the sale of such commodities or services [19] and (c) is located nearest to the seller.

(*h*) *Offering Price.* "Offering price" means the price quoted in the seller's price list, or, if he had no such price list, the price which he regularly quoted in any other manner, except that in the case of sales of commodities by an establishment selling at retail, the offering price shall be the price at which the commodity was offered for sale at the immediate point of sale (for example, the shelves or counters). But "offering price" shall not include a price intended to withhold a commodity or service from the market, or a price offered as a bargaining price by a seller who usually sells at a price lower than his asking price.

(*i*) *Person.* "Person" includes an individual, corporation, partnership, association, any other organized group of persons, legal successor or representative of any of the foregoing, and includes the United States, any agency thereof, any other government, or any of its political subdivisions, and any agency of any of the foregoing.

(*j*) *Price Regulation.* "Price regulation" means a price schedule effective in accordance with the pro-

[19] Words "or service(s)" added by Amdt. No. 7, 6-19-42, 7 FR 4659.

visions of Section 206 of the Emergency Price Control Act of 1942, a maximum price regulation or temporary maximum price regulation issued by the Office of Price Administration, or any order issued pursuant to any such regulation or schedule.

(*k*) *Purchaser of the Same Class.* "Purchaser of the same class" refers to the practice adopted by the seller in setting different prices for commodities or services for sales to different purchasers or kinds of purchasers (for example, manufacturer, wholesaler, jobber, retailer, government agency, public institution, individual consumer) or for purchasers located in different areas or for different quantities or grades or under different conditions of sale.

(*l*) *Raw and Unprocessed Agricultural Commodity or Greenhouse Commodity.* Commodities that are picked, harvested, threshed, ginned, husked, cleaned, dried, baled, boxed, packed, transported, and/or refrigerated, without more, remain "raw and unprocessed." But operations such as slaughtering, freezing, canning, preserving, milling, crushing, straining, centrifuging, shelling of nuts, cooking, distilling, and purifying with heat, constitute processing for this purpose. For the purposes of this General Maximum Price Regulation, flowers, seeds and bulbs shall be deemed raw and unprocessed agricultural commodities as long as they maintain their original identity without being further processed into products commonly designated by other names.[20] Forest products, such as lumber and wood,[21] naval stores and mineral products, whether processed or unprocessed, shall not be deemed to be agricultural commodities.

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[20] Amended by Amdt. No. 4 issued and effective 6–5–42. 7 FR 4339.

[21] Word "wood" added by Amdt. No. 5, 6–12–42. 7 FR 4487.

(m) *Records.* "Records" includes books of account, sales lists, sales slips, orders, vouchers, contracts, receipts, invoices, bills of lading, and other papers and documents.

(n) *Replacement Cost.* "Replacement cost" shall be the net price paid by the seller after May 18, 1942, or the net price which the seller would have to pay to replace such commodity after such date.

(o) *Sale at Retail.* "Sale at retail" or "selling at retail" means a sale or selling to an ultimate consumer other than an industrial or commercial user, except that (1) for the purpose of § 1499.3 of this General Maximum Price Regulation a "sale at retail" shall not include any sale by a producer, manufacturer, or fabricator of any commodity produced, manufactured, or fabricated by him, and (2) for the purpose of §§ 1499.11 and 1499.13 of this General Maximum Price Regulation a "sale at retail" shall not include any sale to the United States, any other government or any of its political subdivisions, any religious, educational or charitable institution, any institution for the sick, deaf, blind, disabled, aged or insane, or any school, hospital, library or any agency of any of the foregoing.[22]

(p) *Sale at Wholesale.* "Sale at wholesale" means a sale by a person who buys a commodity and resells it, without substantially changing its form, to any person other than the ultimate consumer, except that (1)[23] for the purposes of § 1499.3 of this General Maximum Price Regulation a sale at wholesale shall include any sale by such person to an industrial or commercial user,[23] and (2) for the purposes of § 1499.9 (a)*(3), "sold at wholesale" refers to a sale of fluid milk or

[22] Amended by Amdt. No. 7, 6–19–42, 7 FR 4659.

[23] Exception (1) added by Amdt. No. 7, 6–19–42, 7 FR 4659. Exceptions (2) and (3) added by Amdt. No. 21, 8–1–42, 7 FR 6007.

cream in bottles or paper containers to any person, including an industrial or commercial user, other than the ultimate consumer.

(*q*) *Securities.* "Securities" includes any note, stock, bond, and interest or instrument commonly known as a "security."

(*r*) *Sell.* "Sell" includes sell, supply, dispose, barter, exchange, lease, transfer, and deliver, and contracts and offers to do any of the foregoing. The terms "sale," "selling," "sold," "seller," "buy," "purchase" and "purchaser," shall be construed accordingly. Nothing in this Regulation shall be construed to prohibit the making of a contract to sell a commodity or service at a price not to exceed the maximum price at the time of delivery or supply.

(*s*) *Seller.* "Seller" includes a seller of any commodity or service. Where a seller makes sales or supplies services through more than one selling unit, other than salesmen making sales at uniform prices, each separate place of business of the seller shall be deemed to be a separate seller, except that for the purposes of section 16 of this Regulation, the owner of the business shall be considered the seller regardless of the number of separate places of business he owns.

(*t*) *Service.* "Service" includes any service rendered or supplied, otherwise than as an employee, in connection with the processing, distribution, storage, installation, repair, or negotiation of purchase or sale of a commodity, and generally, without limiting the foregoing, all services which preserve or add to the value or utility of a commodity.

(*u*) *Supplied.* A service shall be deemed to have been "supplied" during March 1942, if during such month it was completed or in process.

(*v*) *Flour.* "Flour" means the flour produced from wheat, rye, buckwheat, rice, corn, oats, barley, soy

beans and potatoes. Combinations of flours produced from the said commodities, and bleached, bromated, enriched, phosphated and self rising flours shall be considered flour. Products of wheat, except for whole wheat flour and whole durum flour, whose ash is more than 1/20 of the protein calculated to a moisture free basis plus .35 per cent or, in the case of products of durum wheat, more than 1.5 per cent calculated to a moisture free basis, shall not be considered flour. In determining whether the ash content of bleached, bromated, enriched, phosphated and self rising flours complies with the above ash requirements, allowance shall be made for the increase in the ash content resulting from the addition of the bleaching, bromating, enriching, phosphating and self rising ingredients.[24]

(*w*) *Cake Mixes and Flour Mixes.* "Cake mixes" and "Flour mixes" means combinations of flour or flours with any other ingredients except those used in making bleached, bromated, enriched, phosphated and self rising flours.[25]

(*x*) *Packaged as Applied to Cake Mixes and Flour Mixes.* "Packaged" as applied to "cake mixes" and "flour mixes" means packaged for sale at retail in a container of any sort holding three pounds or less, where the packaging has been done before arrival at the point of retail sale.[26]

(*y*) *Ores.* "Ores"[26a] means any mineral substance in a crude state used chiefly as a commercial source of metal contained therein. "Ore concentrates" means

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[24] Added by Amdt. No. 2, 5–27–42, 7 FR 3990; amended by Amdt. No. 6, 6–19–42, 7 FR 4659.

[25] Added by Amdt. No. 2, 5–27–42, 7 FR 3990; amended by Amdt. No. 6, 6–19–42, 7 FR 4659.

[26] Added by Amdt. No. 2, 5–27–42, 7 FR 3990.

[26a] Added by Amdt. No. 17, 7–25–42, 7 FR 5784.

any ore, as defined above, after the removal of a part of the gangue, or a part of the non-metallic elements, either by a physical or chemical process.

(z) *Precious Stones.* "Precious stones" means any ruby, sapphire, emerald, natural pearl, or any diamond (other than an industrial diamond) weighing more than 1.00 carat, or any semi-precious stone after sale by the cutter, when the cutter has received more than $100 for the sale of the stone. Synthetic stones and cultured pearls shall not be deemed "precious stones." If two or more diamonds (other than industrial diamonds) with an aggregate weight of 1.50 carats are set in one mounting, the diamonds shall be deemed precious.[27]

Other price regulations, applicability, effective date

§ 21 [§ 1499.21] *Effect of other price regulations.* Sections 1499.13, 1499.14, 1499.15, 1499.16 and 1499.25 of this General Maximum Price Regulation shall apply but the other provisions of this General Maximum Price Regulation shall not apply to any sale or delivery for which a maximum price is in effect, at the time of such sale or delivery, under the provisions of any other price regulation issued, or which may be issued, by the Office of Price Administration, unless otherwise provided in any such price regulation.[28]

§ 22 [§ 1499.22] *Applicability.* The provisions of this Regulation shall be applicable to the United States, its territories and possessions, and the District of Columbia.

§ 23 [§ 1499.23] *Effective date.* All the provisions of this Regulation shall become effective on May 11, 1942, except that:

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[27] Added by Amdt. No. 9, 6-30-42, 7 FR 5027; exception for industrial diamonds added by Amdt. No. 13, 7-14-42, 7 FR 5445.

[28] Amended by Amdt. No. 7, 6-19-42, 7 FR 4659.

(a) The provisions of this Regulation, other than sec. 11(a), shall not apply to establishments selling at retail until May 18, 1942;

(b) The provisions of secs. 1 and 2 shall not apply to any sale of services at retail until July 1, 1942; and

(c) The provisions of sec. 11(a) shall become effective upon the date of issuance of this Regulation.

§ 23a [§ 1499.23a] *Effective date of amendments.* (a) This Amendment No. 1 (§§ 1499.13 (b) and 1499.23a) to the General Maximum Price Regulation shall become effective May 18, 1942.

(b) This Amendment No. 2 (§§ 1499.9 (a) (4), 1499.20 (v) (w) and (x)) to this General Maximum Price Regulation shall become effective May 29, 1942.

(c) This Amendment No. 3 (§ 1499.9 (a) (7)) to this General Maximum Price Regulation shall become effective May 29, 1942.

(d) Amendment No. 4 (§§ 1499.9 (a) (1), 1499.20 (l) and 1499.25) to General Maximum Price Regulation shall become effective June 5, 1942.

(e) Amendment No. 5 (§ 1499.9 (a) (14) and paragraph (l) of § 1499.20) to General Maximum Price Regulation shall become effective June 19, 1942.

(f) Amendment No. 6 (§ 1499.20 (v) and (w)) to the General Maximum Price Regulation shall become effective June 22, 1942.

(g) Amendment No. 7 (§§ 1499.1 (c), 1499.7, 1499.15, 1499.16, 1499.20 (f), (g), (o), and (p), and 1499.21) to General Maximum Price Regulation shall become effective June 25, 1942.

(h) Amendment No. 8 (§§ 1499.10 and 1499.20 (c)) to General Maximum Price Regulation shall become effective July 1, 1942.

(i) Amendment No. 9 (§§ 1499.9 (a) (12), 1499.20 (z)) to this General Maximum Price Regulation shall become effective July 2, 1942.

(j) Amendment No. 10 (§ 1499.18) to General Maximum Price Regulation shall become effective July 14, 1942.

(k) Amendment No. 11 (§ 1499.13 (b)) shall become effective July 11, 1942.

(l) Amendment No. 12 (§ 1499.4a) to General Maximum Price Regulation shall become effective July 15, 1942.

(m) Amendment No. 13 (§ 1499.20 (z)) to this General Maximum Price Regulation shall become effective July 16, 1942.

(n) Amendment No. 14 (§ 1499.4b) to General Maximum Price Regulation shall become effective July 21, 1942.

(o) Amendment No. 15 (§ 1499.2 "Special Provisions") to General Maximum Price Regulation shall become effective July 15, 1942.

(p) Amendment No. 16 (§ 1499.9 (a)(7)) to this General Maximum Price Regulation shall become effective July 29, 1942.

(q) Amendment No. 17 (§ 1499.20 (y)) to this General Maximum Price Regulation shall become effective July 30, 1942.

(r) Amendment No. 18 (§ 1499.13 (a)) to General Maximum Price Regulation shall become effective July 30, 1942.

(s) Amendment No. 19 (§ 1499.24) to the General Maximum Price Regulation shall become effective August 6, 1942.

(t) Amendment No. 20 (§ 1499.16) to the General Maximum Price Regulation shall become effective August 8, 1942.

(u) [28a] Amendment No. 21 (§§ 1499.9 (a) (3) and 1499.20 (p)) to this General Maximum Price Regula-

[28a] Amended by Amdt. No. 22, 8-7-42, 7 FR 6216.

tion shall become effective August 7, 1942, except that the effective date of this amendment with respect to both fluid milk sold at wholesale and cream sold at wholesale in the Washington market area as defined in Federal Milk Marketing Order No. 45, as amended, issued by the Secretary of Agriculture August 29, 1941, shall be October 2, 1942.

(v). Amendment No. 22 to this General Maximum Price Regulation shall become effective August 7, 1942.

§ 24 [§ 1499.24] *Appendix A: General Maximum Price Regulation—Report of maximum price determined under § 1499.3 (a)—Form GMPR:2* [*Omitted.*]

§ 25 [§ 1499.25] *Appendix B: Commodities designated by the Price Administrator as Cost-of-Living Commodities* [*Omitted.*]

Issued this 28th day of April, 1942.

(Sgd.) LEON HENDERSON,
Leon Henderson,
Administrator.

STATEMENT OF CONSIDERATIONS INVOLVED IN THE ISSUANCE OF THE GENERAL MAXIMUM PRICE REGULATION

General price increases have become a grave threat to the efficient production of war materials and to the stability of the national economy. It is now necessary to meet this threat decisively. Accordingly, the Office of Price Administration is issuing a General Maximum Price Regulation as the cornerstone for a comprehensive program to eliminate the danger of inflation.

All prices of all commodities and services are now subject to great inflationary pressure. Within the limits of present statutory authorization, this Regulation establishes maximum selling prices for all commodities and services for which maximum prices have not hitherto been fixed. By so doing, it brings all sellers and all buyers within the compass of wartime economic mobilization. It combats the danger of inflationary price advances at all places where that danger exists.

It is the immediate purpose of this Regulation to guarantee to the American people that their living costs will remain stable. This is a prerequisite to the further measures which are necessary to insure wartime stability in the economy. Stable living costs mean stability in the real wages of the worker. With price stability, wage stabilization, an important step toward stabilization of the aggregate volume of purchasing power, becomes a practical goal of public policy. Every producer whose prices are stabilized is assured that his costs, which are based upon the

stabilized prices of others, will not rise. Stability in the price level means that participants in war-savings programs are assured that the real value of their savings will be maintained. Likewise, the taxpayer knows that his remaining untaxed income will have an assured purchasing power. All of these measures become possible when prices are stabilized. All of them are necessary in order that price stabilization may work.

This Regulation does not insure that the standard of living of any individual or group or of the Nation as a whole will remain unimpaired. The loss of overseas supplies and the conversion of domestic manpower and facilities to war production make this impossible. The material standard of living of the American people will fall. But this Regulation does help to protect the Nation against inflationary maladjustments as between different people and classes of people. And it does help insure that scarce goods will be allotted on a basis of equality. In the absence of this Regulation many scarce items would come into the possession of those best able to pay high prices. This Regulation is an indispensable prerequisite to the allocation of scarce but essential goods to the members of the community on the basis of need rather than on the basis of ability to pay.

But in its larger context this Regulation is necessitated by the danger of inflation. The full implications of this danger for war production and domestic stability are worthy of a complete and careful statement.

The Inflation Crisis

A gap has appeared between the supply of goods and services which is available and the purchasing power or demand of the people who wish to buy these goods

and services. This gap is widening. Both military and civilian demand have increased vastly in recent months. War expenditures, which totaled $1,000,000,000 in March 1941 and $2,000,000,000 in December 1941, rose to nearly $3,000,000,000 in March 1942. In December 1942, on the basis of present authorizations, these expenditures will exceed $6,000,000,000.

Civilian demand has its source in income payments to individuals by the Government and by industry. The rate of monthly increase in these payments has advanced from one-half of 1 percent in the months immediately following the outbreak of the war in September 1939, to 1 percent, to 1½ percent, and since March 1941 to 2 percent. There is evidence of a further acceleration in this rate of increase in the future.

The supply of civilian goods and services available for purchase from this income is diminishing. Manpower, materials, and machinery are being devoted to the production of planes, ships, tanks, and guns instead of to the production of civilian goods and services. The supply of such civilian goods and services will be progressively reduced by approximately 1 percent per month for the balance of this year.

During 1941, it is estimated, individual income totaled $92,000,000,000. Of this amount $18,000,000,000 was accounted for by personal taxes and individual savings, and $74,000,000,000 was spent on consumers' goods and services.

During 1942, at the present rate of increase of income payments, individual income will total $117,000,000,000. Of this amount, it is estimated $31,000,000,000 will be saved or paid to the Government in personal taxes and $86,000,000,000 will be spent.

The supply of goods and services available for civilian use totaled $74,000,000,000 in 1941. During 1942, the supply will total $65,000,000,000, computed

on the basis of 1941 prices. Making allowance for the increase in prices which took place prior to April 1, 1942, the supply will total $69,000,000,000.

Thus, demand in 1942, unless limited, will exceed supply by $17,000,000,000.

The Effect of the Inflationary Gap on Prices

The gap between the total purchasing power available for disposal by the people of the United States and the total supply of goods and services available for them to purchase has caused, in recent months, a a general advance in prices and an advance which is accelerating in rate. It has made the advance common to services and to all classes of goods, whether farm products or industrial commodities, raw materials or merchandise in wholesalers' or retailers' stocks.

The increasing momentum of this over-all price advance is shown by the following comparisons: since the outbreak of the war in September 1939 the prices of basic raw materials have risen by 66 percent. One-half of this increase has occurred during the past 12 months. Wholesale prices since September 1939 have increased by 31 percent. Two-thirds of this increase has occurred during the past 12 months. Retail prices of foods, clothing and house furnishings have risen, since September 1939, by 25 percent. More than three-fourths of this increase has taken place during the past 12 months.

The $17,000,000,000 by which projected demand will exceed the supply of goods available during 1942, if left to itself, would force an estimated increase of 25 percent in the cost of living this year. But price increases build on each other. Increases in the cost of living lead to wage adjustments. These in turn

augment purchasing power at the same time that they increase industrial costs. Therefore, by the time prices had risen the 25 percent necessary to raise the value of the available supply of goods up to the total dollar demand now forecast, the total demand would itself have increased. Left to itself, the process has no definite end. It can be stopped only by measures which will eliminate the occasion for increased income payments on one hand, and narrow the gap by withdrawing excess purchasing power on the other. The alternative is inflation.

The Consequences of Inflation

The consequences of inflation are the consequences of the stage which it is permitted to reach. We have already passed through a mild stage of inflationary price advance. We are entering, as the foregoing analysis shows, a more severe and intensive stage—a stage where the upward movement of prices will increase both in magnitude and in tempo. Beyond that stage lies the fatal spiral which engulfed the countries of central Europe following the first World War.

The first stage, that which we have already experienced, is itself a warning of what is to come. Many of our people with smaller incomes have already seen the necessaries of life pass beyond the reach of their slender means. They have already experienced the sense of hopelessness and frustration which comes with the change from subsistence to a deeper poverty. They have already brought their children to a table from which accustomed and necessary foods have been removed by rising prices.

Suspicion of undue advantage and profiteering has already been engendered between farmer and worker, and worker and employer. True unity of purpose

must rest on the conviction that reward and sacrifice are received and rendered in common. The irregular, uncertain, and manipulative advances in prices which characterize all stages of inflation have already damaged that conviction.

In a narrower sense, inflation has already multiplied the cost of the war. The price rises which have occurred since September 1939 will increase by 35 billions of dollars the money cost of the war program now authorized. The total cost of the first World War, by comparison, was 31 billions, and that 31 billions, it is estimated, included 13½ billions of inflated prices.

These things have already happened. They are behind us. The next stage of inflation—the one that we now face—will extend this pattern. And it will add to it a new and far more serious configuration. If unchecked, inflation will launch a race between the wages of the stronger bargaining groups and the cost of living. This means constant revision of wage contracts, constant bargaining and negotiation and the certain prospect of interrupted production. The normal collective bargaining processes are strained, perhaps broken. Business commitments are placed on a month-to-month, perhaps on a week-to-week basis. Business planning gives way to make-shift decision. War production is shackled and perhaps disrupted. It may be paralyzed.

In a sense, inflation is a substitute for production. Money is made not by producing commodities, but by withholding them from use. Scarce materials find their way into inventories and hoards, and profit is derived from advancing markets. The speculator rather than the producer becomes the successful businessman. Materials that might yield tanks and guns

for the armed forces, or food and clothing for our people at home, are surreptitiously routed to the warehouse.

Those whose incomes are small and fixed have already suffered. During the stage of inflation now ahead, their position will become desperate. The well-stocked store will become an empty fraud for our old people who live on annuities and pensions, for dependents of our soldiers and sailors, and for the substandard wage groups whose bargaining position is weak. The prices of necessaries will have passed beyond their reach. For during inflation goods are reserved for the person with the longest pocketbook, the person who is able to protect himself during the upward spiral, or the person who has turned the spiral to his selfish advantage.

The pattern of disaster which attends the final stage of inflation is well known. In this stage prices are revised upward weekly and then daily. Incomes enter into a crazy race with prices. Money is something to be passed on as quickly as possible. It is no longer a symbol of stability but a mark of social disintegration. Thrift and saving become incompatible with self-preservation. Savings, investments, life insurance policies, all the results of past thrift, become worthless. Legitimate business disappears; speculation and profiteering remain. Organized government itself is undermined.

The hopelessness and frustration of the early stages of inflation soon turn to anger and despair.

To think of mobilization of resources for war in such an environment is the merest fancy.

Inflation does not always run its full course, although between the present stage and the final collapse there is no definite stopping place. But the principle can be laid down that the greater the period over which the

process extends without complete and effective control, the more serious and the more painful is the task of stopping it, and the more dangerous the disorganization which must follow. The present inflationary movement may, of course, end, not with wild inflation, but with the end of war and war-occasioned spending. Or it might be brought to a halt by measures such as those which are now being taken. In the first case, the clear consequence would be a complete and ruinous deflation. Those who were not destroyed by the inflation would be ruined by the ensuing collapse. And deflation, even more than inflation, has shown itself the cause of social disorganization. It was more than a decade after the first World War before agriculture and much of labor and industry in the United States recovered from the wreckage of the 1921 collapse. More serious still, there were wrecked lives and disbanded families for whom there was no recovery at all.

Inflation might also be checked sometime in the future by measures such as those now being taken. Of this it is necessary to say but one thing. While the present measures are painful, they are far less painful than those that would be required a year hence. It is never easy to check an inflationary movement. But there will never be a time when it will be less painful than now.

The Universal Price Ceiling

Until 6 months ago, the main pressure on the price system was wartime demand or wartime shortage of a relatively small number of commodities. Among those were metals, chemicals, sugar, and lumber. Prices for many of these commodities quickly rose to levels higher than were required to bring out available production. These price rises could be checked, and were checked, by individual ceilings on the wholesale price. For

other commodities, price control was not then desirable. In fact, full use of productive facilities and labor, and the transfer of labor and materials from less essential to more essential employments, was aided by flexibility in the price structure. As the pressure from excess demand and diminishing supply grew during the past 6 months, selective controls were multiplied.

Production in the United States has been increased to such an extent that it cannot hereafter be greatly stimulated by additional price rises. Further reorganization of the economy for war must be accomplished through priorities, allocations, and rationing, rather than through price. The pressure toward higher prices is now not merely on shortage commodities, but on all commodities. The same reason which called for selective controls—the need for avoiding price increases beyond those reasonably required to increase production—now calls for the universal control over all commodities.

This step accords with the experience of other countries as they reached the advanced stages of war mobilization. Such a state of mobilization was reached in Germany in 1936. A universal price ceiling was proclaimed in that year. In the democracies, the point was not reached until after the outbreak of war. Both Canada and Australia have preceded us in adopting the general price ceiling. As they reached the stage which the United States has reached today, they, too, found that general control of prices was necessary.

The Companion Measures to the Universal Price Ceiling

The increased inflationary pressure and this Regulation serve as a setting for companion steps in wage, profits, and fiscal policy. When pressure of prices was principally on shortage commodities, governmental

policies designed to limit the growth of consumer income were exercised with restraint. Demand, was excessive only in relation to certain shortage materials, and deflationary economic measures other than selective price control necessarily affect the entire economy. The removal of the purchasing power which was causing the individual price rise could have been achieved only at the expense of simultaneously reducing purchasing power throughout the economy. This purchasing power was being advantageously used to call forth added production. Therefore, income-restraining policies were not necessary as an adjunct to price control and would have been undesirable.

Today, on the other hand, it is important that the excess of purchasing power be rigidly confined. Even if it were possible for this Regulation to continue side by side with an excess of purchasing power the combination would present grave dangers. These dollars would find an outlet in extravagant purchases of goods not immediately needed by the purchaser; they would lead to the burdensome problems of administration and regulation involved in unnecessarily widespread rationing; they would lead to wasteful use of goods which could not but impair national morale.

But more important than these considerations is the elemental fact that there can be no effective price control while at the same time there is so large an amount of excess purchasing power Price regulations must not only be promulgated; they must be accepted and where necessary enforced. The full pressure of excess purchasing power would insure the disregard of law.

The universal price ceiling serves as the framework for other policies which will diminish the inflationary gap. It makes possible an effective war labor policy,

more stringent income and excess-profits taxes, and greatly enhanced savings.

Just as the universal ceiling can operate only when accompanied by these economic policies, so these policies can succeed only when accompanied by the universal ceiling. These economic controls other than price control can operate only generally throughout the economy. They do not check specific price rises in commodities which, because of shortages and other reasons, are subject to unusual pressures. For this purpose a price ceiling is necessary.

The universal ceiling is a necessary adjunct of these companion policies for a further reason. It takes time for such policies to be developed and put into execution, and still more time for their impact to be felt. During this time prices would become further inflated. Unless the inflationary spiral is checked, no economic measures can close the resulting gap. On the other hand, by a prompt over-all ceiling, labor will be relieved from the pressure to demand higher wages in order to keep up with the increased living costs. Those whose dollar income is to be curtailed by increased taxation and savings will have a guaranty that their real income will not be further impaired by price increases and that the value of their savings will not disappear. Businessmen whose prices are fixed will have the assurance that their material costs are also stabilized. Such guaranties must be made before these economic steps can successfully be taken.

Both the universal ceiling and these related economic measures are thus essential to overcome inflation. Without the ceiling, the economic measures might prove to be too little and too late. Without the economic measures, the ceiling would in the long run

become administratively unenforceable and socially harmful. Together, they can abruptly and effectively stop the inflationary spiral.

The Regulation and the Standards of the Act

The Emergency Price Control Act of 1942 provides that whenever in the judgment of the Price Administrator the prices of commodities have risen or threaten to rise he may, by regulation, establish such maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of the act. In the present situation the prices of commodities and services generally are rising and threatening further to rise and this regulation prescribing maximum prices for commodities and services conforms to the statutory standards.

The underlying purpose of the act is to check, and so far as possible prevent, inflation. The purposes of the act, as set forth in section 1 (a), include the avoidance of unwarranted price increases, the assurance that defense appropriations are not dissipated by excessive prices, and the protection of persons with relatively limited incomes. Today it is clear not only that this over-all ceiling will effectuate these purposes but in addition that, realistically, it is the only price regulation which will achieve that result. It achieves that result directly and also indirectly by making possible the execution of related wage and fiscal policies having that effect. In face of the present grave crisis this provides the basic justification for the regulation.

1. Breadth of the Regulation.—The imminence of price increases throughout the economy requires price control which is likewise made generally effective. There are inflationary pressures on prices everywhere. And so everywhere that prices exist there must be controls to prevent them from rising any further.

Retail prices cannot be held down if costs to retailers are left free to rise without limit. There must be control of manufacturers' and wholesalers' prices. And at all levels—retailer, wholesaler, and manufacturer—the control of the prices of cost-of-living items must be based upon control of the prices of all the commodities that enter into the costs of those items. The interdependence of prices, when prices are rising generally, prohibits any possibility of piecemeal control.

Even where prices do not affect each other directly, as costs, they affect each other indirectly. To control the price of more essential products and leave the price of less essential products uncontrolled at best involves arbitrary distinctions. More important it prevents labor and materials from being used in more essential uses and increases the cost of ingredients of the essential items. If a price is fixed on an essential item, and nonessentials remain uncontrolled, manufacturers will switch from the essential to the nonessential. The transfer may be easier in some instances than others, but the tendency is plain. A limited Regulation would obstruct the concentration of men and materials in the most important uses. In war, that concentration is of vital importance.

2. *The base period.*—The core of the General Maximum Price Regulation is its requirement that each seller charge no more than the prices which he charged during the base period, March 1–31, 1942. The basic fairness of this approach is that it catches hold of the price structure during a given period and holds it fast until a judgment can be made as to what adjustments, if any, are needed. The Regulation accepts the level and relationships of prices worked out by the buyers and sellers of the commodities at various economic levels. This is fair and reasonable. Certainly

it is a sufficient basis for a price stop which is offered as a general regulation subject to future refinements and allowances for gross inequities.

The base period is the only competent technique which will assure fairness in general without striving for the sort of fairness in particulars which cannot practicably be achieved in the first step. It is significant that Canada has used a similar base-period technique, and has found that it works.

The selection of one base period rather than another is a matter for reasonable administrative determination. In general, the Price Administrator is of the opinion that a period as near in time as possible to the date of issuance of the regulation provides the fewest administrative difficulties and is likely to cause the least disruption. The issuance of this regulation could not be simultaneous with the determination that it should issue. There were technical considerations to be thought through and disposed of. There were meetings and consultation with trade groups. Care had to be exercised and judgments checked lest the regulation by some mishap, or faulty selection of time or conception, jeopardize rather than further the war program. These deliberations were conducted with all possible dispatch but nevertheless they took time. In the meanwhile there was reason to believe that some merchants had been marking up their prices in anticipation of the possibility of a large-scale program. Complaints of an unusually precipitate increase in prices were made on the floor of the Congress. The situation was partially controlled by the fact that some representatives of commerce and industry were consulted with respect to various technical considerations since an early date in April 1942. Finally, the use of a single calendar month presented an advantage for the many persons whose records were so kept that such

a base period would present fewest problems in making arrangements to comply.

The favorable condition of profits generally strongly supports the regulation. Sellers in general earned profits in 1941 which compared very favorably with profits earned in the period 1936–39, inclusive. The 1936–39 period offers a fair criterion for the profitability of corporate operations before the disturbing effects of the war. It includes the 2 relatively prosperous years, 1936 and 1937, 1 poor year, 1938, and 1 fair year, 1939. Taking the 1936–39 average of corporate profits as 100, the following table indicates the percentage of increase of 1941 corporate profits at the various levels:

Corporate profits before taxes, 1936–41

[Index numbers, 1936–39 average = 100]

Year	Profits of all corporations	Profits of consumers goods manufacturing, wholesale and retail trade corporations			
		Manufacturing	Wholesale trade	Retail trade	Total
1936	114	127	117	126	120
1937	115	98	97	103	99
1938	52	55	58	56	56
1939	118	119	128	115	120
1940	159	141	167	165	156
1941	319	244	302	288	274

The act provides that maximum prices shall be fair and equitable and shall reflect, so far as practicable, a due administrative consideration of prices prevailing between October 1 and 15, adjusted for prior and subsequent increases and decreases in costs and profits.

The general fairness and equity of the Regulation has been shown. It is, moreover, based upon the largest adherence to and consideration of the subsidiary standards which is practicable at the present time.

The adjusted October 1 to 15 base period has already been adopted for producers of a large number of groups of commodities. In the case of other commodities, some increase over October 1 prices may be necessitated by cost increases too substantial to be absorbed, in view of profit positions. The Regulation establishes March 1942 prices as the lawful maximum but supplementary regulations, following analysis of individual commodities which cannot practicably be analyzed separately at this time, may establish prices closer to October 1 prices as adjusted.

The prices of wholesalers and retailers may not necessarily be brought back to their October 1–15 level even where manufacturers' maximum prices are based on October 1 prices, for to a degree some distributors refrain under normal circumstances from marking up their prices so as fully to cover current replacement costs.

In view of this factor, in view of the manufacturers' prices permitted to remain above October 1–15, 1941, prices, for the initial purposes of this general regulation, and in view of the general, though not necessarily immediate, tendency of businessmen to raise their prices as costs increase, the General Maximum Price Regulation considers, so far as practicable, the subsidiary standards of the act.

3, Supplementary regulations; the lag. It was obviously not practicable to ascertain costs and profits of the sellers of each particular commodity and service, or the sellers of each particular commodity at each business level. To have done so would have required so much time as to mean the loss of the fight against inflation. But the considerations and data mentioned above and all other data available to the Office of Price Administration support the general fairness and equity

of the regulation. In large-scale affairs of practical importance it is necessary to make a beginning. So long as the broad outlines of the general regulation are fair, particular difficulties may be handled upon subsequent prompt consideration. No other course is possible or practicable. This is particularly true in the domain of price regulation where so much depends upon prediction and a sense of judgment, and where so much must inevitably be a matter of trial and error and adjustment, with expectations tested in actual experience.

This general regulation will be subject to many refinements and particular revisions. Supplementary regulations will be issued. These will seek to cure difficulties of a technical nature. More important, they will change prices and price margins. They will be issued expeditiously. Accordingly, the first supplementary regulations may themselves be of a relatively general approach subject to further readjustments as time and experience point the way.

The Regulation does not at this time make express provision by multiple base periods for the so-called lag in retail prices. Some retailers have asserted that they determine prices for their wares on the basis of the average cost of their inventory rather than on the basis of replacement costs. They further advise that the regulation should be so constructed as to enable them to acquire new stock below replacement costs in order to preserve their existing percentage margins.

But the difficulty is that the lag is by no means of uniform or universal applicability. A substantial percentage of the commodities purchased by retailers have been stabilized, at the manufacturers' and wholesalers' levels, at prices not exceeding prices prevailing in October 1941. Other goods have been subject to con-

trol upon the basis of prices later in 1941. Retail prices in March 1942 may fairly be assumed to have taken account of such 1941 prices.

Further, there are many commodities of a low-priced fast-moving nature, and commodities such as fresh meats, where retailers are virtually on a replacement-cost basis.

Attention should also be called to a number of items in which the retail prices have increased more percentage-wise than have wholesale prices. This is true of many house furnishings and floor coverings.

In appraising the position of the retailer it must be borne in mind that the wholesalers' prices accepted by this Regulation are prices upon *deliveries* made in March, and not upon orders accepted in March for future delivery. This is a measure which in effect establishes price relationships adjusted to a lag, since in general such lag as exists is likely to be greatest where turn-over is slow. Moreover, to the extent that the lag is likely to accompany large inventories, the existence of these inventories, received over a period and averaged by the retailers, will mean that there will be no immediate hardship and that there will be time to work out adjustments.

The protection provided by large inventories is underscored by the following data on inventories made available by the Department of Commerce:

Retail business inventories	*Value (in millions of dollars)*
End of Month:	
February 1940	5,042
February 1941	5,494
February 1942	6,875

Corrected for the rise in prices, the physical inventory for February 1942 was 6.4 percent greater than it was for February 1941 and 14.7 percent greater than it was for February 1940.

To some extent a lag does exist but such lag as exists is uneven, depending upon the relative movement of wholesale and retail prices. No single formula to correct the lag can be found which would not itself provoke injustices. Moreover, other costs of the retailers have not increased as rapidly as wholesalers' prices; indeed, some are relatively low. The situation calls for a carefully planned and properly executed program, which will review the particular situations where the lag in fact exists. This program the Office of Price Administration has already undertaken.

One thing should be clearly understood. Retail prices will not be increased. Any such course of action would set in motion the rising cost of living trends, the prevention of which is the very purpose of this Regulation. Adjustments may be made in manufacturers' and wholesalers' prices. Efforts will be made to foster economies in manufacturing and distribution, as by the standardization and simplification of goods and by the elimination of unnecessary frills. If necessary, other forms of relief will be devised. But the ceiling will not be punctured.

4. *Exceptions.*—Certain commodities and services are excepted from the operation of the general regulation. There are a variety of reasons for these exceptions. One class of commodities is wholly withdrawn from the regulation by the Act itself. Section 302 (*c*) in defining commodity excludes books, magazines, motion pictures, periodicals, newspapers, etc. It also excludes securities; these are excepted for the additional reason that they do not affect the cost of living.

Another group of exceptions from this regulation consists of commodities which are eligible for regulation under the Act but subject to control only at price levels higher than those prevailing in the March base period. Because of the limitations of Section 3 no

maximum price limitations are being placed on butter and eggs, poultry, mutton and lamb, and other commodities. In some instances, although an agricultural commodity is below 110 percent of parity, it has been possible to include the commodity after it has left the hands of the farmer and has reached the processor since the price at that stage, because of the extent of the intervening margins or because of the nature of the market and competitive conditions will not operate to prevent the agricultural commodity from reaching the price required by section 3 (a).

In addition, a number of commodities are excluded for reasons of administrative impracticability, resulting from lack of standardization of units, the frequency and small size and character of the transactions involved, or some other factors. Examples of commodities excepted at all stages for administrative reasons include rare stamps, coins, and books; antique furniture; live animals, and the like. Other exceptions from the Regulation are attributable to the fact that the commodity involved is subject to Regulation at a subsequent stage of production or distribution where effective control may more feasibly be exercised. Such commodities include raw and unprocessed greenhouse or agricultural commodities (some of which would in any event have been excepted in view of section 3); and ores and concentrates.

Reference may also be made to a group of exceptions not yet delineated representing commodities almost exclusively purchased by Government agencies for use in the war effort. The principle of exclusion is intended to further the war effort, and to prevent any possibility of disruption thereof and will be implemented by separate exclusionary regulations and orders supplemental to the general regulation, to be issued as the need may be indicated.

5. Records and Reports; Licensing and Registration.—The Regulation provides for the keeping of records, a statement of base prices to be made available for examination, the marking or posting of the maximum prices of stated cost-of-living commodities, and the licensing and registration of retailers and wholesalers. The content of these provisions is clearly set forth in the regulation itself and needs no further clarification in this statement. These are the minimum provisions necessary to make price control effective and enforceable. While not containing the substance of the general regulation, they are in many respects the most important provisions from a practical point of view.

6. Conclusion.—The rapid, erratic increases in prices we call inflation is no longer a threat; to a painfully substantial degree it is a fact. Today we have no choice left but burdensome price controls on a Nation-wide front, buttressed by complementary economic measures, or a bitter and disastrous defeat in an economic war which would destroy the fruits of the victory which will ultimately be ours. We have chosen to meet the formidable enemy at home with the total economic mobilization of universal price regulation. In this war and the other there will be casualties. Neither mobilization will be easy. Our greatest strength remains the common understanding of all our peoples that only in this way can the future of our democracy be insured.

Issued this 28th day of April 1942.

(Sgd.) LEON HENDERSON,
Leon Henderson,
Administrator.

TITLE 32—NATIONAL DEFENSE

CHAPTER XI—OFFICE OF PRICE ADMINISTRATION

Part 1499—Commodities and Services

GENERAL MAXIMUM PRICE REGULATION

SUPPLEMENTARY REGULATION NO. 11—EXCEPTIONS FOR CERTAIN SERVICES[1]

A statement of considerations involved in the issuance of this Supplementary Regulation, issued simultaneously herewith, has been filed with the Division of the Federal Register. For the reasons set forth in that statement, under the authority vested in the Price Administrator by the Emergency Price Control Act of 1942 and pursuant to section 1499.10 of the General Maximum Price Regulation, Supplementary Regulation No. 11 is hereby issued. Section 1499.26 (c) (2) heretofore a part of Supplementary Regulation No. 1 is hereby incorporated into this Supplementary Regulation No. 11.

1499.46 *Exceptions for Certain Services.* (a) The provisions of General Maximum Price Regulation, other than section 1499.11 (a), shall not apply to the following services until July 1, 1942:

(1) Transportation services of carriers, other than common carriers within the exemption conferred by Section 302 (c) of the Emergency Price Control Act of 1942.

(2) Commercial storage and warehousing and services incident thereto.

(3) Services of stevedoring companies.

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[1] 7 F. R. 4543.

(4) Services of car loading and car unloading companies.

(5) Services of transportation equipment rental companies.

(6) Services of freight forwarders, consolidators, or distributors, not offering such services to the general public as common carriers within the exemption conferred by Section 302 (c) of said Act.

(7) Terminal services.

(8) Services of transportation brokers.

(9) Services of custom brokers.

(10) Services of transportation agents (other than employees of transportation companies).

(11) Packing, crating, marking and labelling of shipments.

(12) Pre-cooling, icing, ventilating, and heating of shipments and of transportation equipment.

(13) Dry cleaning services sold other than to the person owning the commodity upon which the service is rendered, by any dry cleaning establishment.

(b) Definitions.

(1) Unless the context otherwise requires, the definitions set forth in section 1499.20 of the General Maximum Price Regulation shall apply to the terms used herein.

(c) Supplementary Regulation No. 11 (1499.46) shall become effective June 17, 1942.

(Pub. Law 421, 77th Cong.)

Issued this 16th day of June, 1942.

(Sgd.) LEON HENDERSON,
Leon Henderson,
Administrator.

STATEMENT OF CONSIDERATIONS INVOLVED IN THE ISSUANCE OF SUPPLEMENTARY REGULATION NO. 11 TO THE GENERAL MAXIMUM PRICE REGULATION

Supplementary Regulation No. 11 postpones until July 1, 1942, the effective date of the General Maximum Price Regulation with respect to transportation services and various other services allied to transportation. Maximum prices with respect to part of the above services became effective on May 11, 1942; the General Maximum Price Regulation, however, postponed the effective date of maximum prices for services at retail until July 1, 1942. As originally issued, the General Maximum Price Regulation was inapplicable to the services of a common carrier or other public utility. The services, effective date of the General Maximum Price Regulation to which is postponed by Supplementary Regulation No. 11, include those of carriers other than common carriers, those of persons engaged in furnishing commercial storage and warehousing, stevedoring companies, carloading and car unloading companies, freight forwarders, consolidators and distributors who do not hold themselves out to serve the general public as common carriers, terminals, transportation brokers and customs brokers. After July 1, 1942, the maximum rates and charges for such services may not exceed the applicable maximum price or charge permitted by the General Maximum Price Regulation. The postponement of effective dates with respect to those services is occasioned by the vital need of avoiding any possible interruption in the flow of commodities. Accordingly, persons furnishing such transportation and allied services are given further time in which to conform their establishments to the requirements of the General Maximum Price Regulation.

So that all services excepted from the General Maximum Price Regulation either for a limited time or without limitation in time may, for convenience of reference, be incorporated in one supplementary regulation, the provisions for postponement until July 1, 1942 of the effective date for dry-cleaning services heretofore contained in section 1499.26 (c) (2) of Supplementary Regulation No. 1 has been incorporated into this Supplementary Regulation No. 11.

Issued this 16th day of June, 1942.

(Sgd.) LEON HENDERSON,
Leon Henderson,
Administrator.

TITLE 32—NATIONAL DEFENSE

CHAPTER XI—OFFICE OF PRICE ADMINISTRATION

Part 1499—Commodities and Services

GENERAL MAXIMUM PRICE REGULATION

AMENDMENT NO. 1 TO SUPPLEMENTARY REGULATION NO. 11—EXCEPTIONS FOR CERTAIN SERVICES[1]

A statement of the considerations involved in the issuance of this Amendment, issued simultaneously herewith, has been filed with the Division of the Federal Register. In section 1499.46 paragraphs (b) and (c) are redesignated paragraphs (c) and (d) (1) respectively and a new paragraph (b) is added as set forth below.

1499.46 *Exceptions for Certain Services:*

* * * * *

(b) General Maximum Price Regulation shall not apply to the rates, fees, charges or compensation for the following services:

(1) Accountants and auditors, fees and charges of

(2) Actuaries, fees and charges of

(3) Advertising agencies, rates charged by

(4) Advertising facilities (outdoor), rates charged for use of

(5) Agents: Artists', authors', playwrights', actors', fees and charges of

(6) Adjustment agencies, fees and charges of

[1] 7 F. R. 4738.

(7) Arbitration and Conciliation services, fees and charges for

(8) Architects, fees and charges of

(9) Authors, fees and compensation of

(10) Bookkeeping services, compensation for.

(11) Booking agents (theatrical, etc.), fees and charges of

(12) Check-cashing services, fees and charges for

(13) Chemists (consulting), fees and compensation of

(14) Claim adjusting, charges for

(15) Collection bureaus and agencies, fees and rates of

(16) Correspondents, fees and compensation of

(17) Court reporting (except when a transcript is furnished), fees and charges for

(18) Credit information services, rates and charges for

(19) Detective agencies, fees and charges of

(20) Efficiency experts, fees and charges of

(21) Electricity (companies furnishing, as public utilities), rates charged by

(22) Employment agencies, rates charged by

(23) Engineers, consulting (civil, electrical, mechanical, marine, etc.) other than engineering firms engaged in the sale of equipment or in contract construction, fees and charges of

(24) Entertainers, fees and compensation of

(25) Express companies and freight forwarders offering their services to the general public as common carriers, rates charged by

(26) Electrical logging of oil-well holes, charges for

(27) Financial services, fees and charges for

(28) Farm-management services, fees and charges for

(29) Fire-reporting services, fees and charges for

(30) Gas (companies supplying, as public utilities through mains), rates charged by

(31) Grain warehousing services performed for the United States or any agency thereof.

(32) Hunting, fishing, and trapping on preserves, rates charged for

(33) Incorporation services, fees and charges for

(34) Insurance, rates charged by any person selling or underwriting

(35) Investment counselling, fees and charges for

(36) Lawyers, fees and charges of

(37) Lecturers, fees and compensation of

(38) Light, heat, or power (companies furnishing, as public utilities), rates charged by

(39) Mannequin and modelling services, fees and compensation for

(40) Marketing forecasting, fees and charges for

(41) Merchandising counsel, fees and charges of

(42) Motion pictures or other theater enterprise, rates charged by

(43) News syndicates, rates charged by

(44) Newspapers, periodicals and magazines, rates charged by

(45) Notary publics, fees and charges of

(46) Personnel Management services, fees and charges for

(47) Press association and feature services, rates charged by

(48) Process servers, fees and charges of

(49) Public-relation and publicity counsels, fees and charges of

(50) Radio and television stations, rates charged by

(51) Rates and charges by persons engaged in the business of publishing, printing, typesetting, plate-making and binding and rendering related services in

connection with books, magazines, newspapers and periodicals.

(52) Research services (Food, investment, laboratory, statistical, marketing, etc.), fees and charges for

(53) Seismographic exploration, rates charged for

(54) Services rendered in connection with title guaranty, title search, abstracting and surveying, fees and charges for

(55) Services the rates for which are regulated by the Department of Agriculture under the Stockyards and Packers Act.

(56) Shot-hole drilling, fees and charges for

(57) Speakers' bureaus, fees and charges of

(58) Systematizing services, fees and charges for

(59) Tax consultants, fees and charges of

(60) Telephone service, secretarial, rates charged for

(61) Telephone services, rates charged for

(62) Telegraph service, rates charged for

(63) Ticker services, fees and charges for

(64) Ticket services and agencies for theater, or passenger transportation, fees and charges for

(65) Tourist agencies and travel bureaus, fees and charges of

(66) Traffic consultants, fees and charges of

(67) Translation services, fees and charges for

(68) Transportation of commodities by persons offering their services to the general public as common carriers by rail, water, motor, pipe line, or other means of conveyances, rates charged for; Provided, however, that charges for storage and warehousing and all other services incident thereto by any person shall not be excluded from the General Maximum Price Regulation.

(69) Transportation of persons, rates charged for

(70) Tree surgery, fees and charges for

(71) Veterinarians, fees and charges of

(72) Watchman services, fees and charges for

(73) Water (companies supplying, to urban areas as public utilities), rates charged by

(74) Window display service, fees and charges for

* * * * *

(d) * * *

(2) Amendment No. 1 (1499.46 (b)) to Supplementary Regulation No. 11 shall become effective July 1, 1942.

(Pub. Law 421, 77th Cong.)

Issued this 23rd day of June 1942.

(Sgd.) LEON HENDERSON,
Leon Henderson,
Administrator.

STATEMENT OF CONSIDERATIONS INVOLVED IN THE ISSUANCE OF AMENDMENT NO. 1 TO SUPPLEMENTARY REGULATION NO. 11 TO THE GENERAL MAXIMUM PRICE REGULATION

By Amendment No. 8 to the General Maximum Price Regulation, issued simultaneously herewith, section 10 is rewritten. It no longer specifically exempts any services but merely provides that services excepted from the General Maximum Price Regulation are to be specified in supplementary regulations or amendments thereto. To clear up any misunderstanding concerning the services that are excepted, the Amendment contemplates the issuance of specific lists of services excepted from the General Maximum Price Regulation.

This Amendment to Supplementary Regulation No. 11 substitutes a detailed list of services excepted in lieu of the categories of services formerly excepted by section 10 of the General Maximum Price Regulations prior to the amendment thereof. Common carriers and public utilities excepted are specifically named. The questions that have arisen concerning what financial services are covered are resolved. Some financial services are rendered in connection with a commodity others are not. Between, there is a fringe of doubtful cases. For administrative reasons, most financial services have been excepted from the General Maximum Price Regulation. There is no longer a specific exception for services relating solely to real property. This exception formerly contained in section 10 of the General Maximum Price Regulation gave rise to some confusion. Many services, although they may relate to real property, are also rendered "in connection with the processing, distribution, storage, installation, repair,

or negotiation of purchase or sale of a commodity," or, "preserve or add to the value or utility of a commodity" and thus fall within the definition of the term "service" in the General Maximum Price Regulation. Such services are covered by the General Maximum Price Regulation unless specifically excepted. Thus, construction services, for example, are covered by the General Maximum Price Regulation. Fees and charges for services rendered in connection with title guaranties, title searches, abstracting, and surveying are specifically excepted by this Amendment to Supplementary Regulation No. 11.

This Amendment also excepts grain warehousing services performed for the United States or any agency thereof and stockyard services subject to the Stockyards and Packers Act. Charges for these services are now subject to supervision by other federal agencies and at present no specific price action with respect to such services is deemed necessary.

There are a number of services not covered by the General Maximum Price Regulation which are not listed in this Amendment. This is because such services are clearly excluded from the General Maximum Price Regulation by the definition of the term "service," since they are not rendered in connection with a commodity. Such services include those rendered by ambulances, athletic and health clubs, barber shops, bath and masseur establishments, beauty parlors and beauticians, chiropractors, dentists, hospitals, medical clinics, midwives, nurses, osteopaths, physicians and surgeons, recreation clubs and camps, reducing salons, and sanatoria.

Issued this 23rd day of June 1942.

(Sgd.) LEON HENDERSON,
Leon Henderson,
Administrator.

CERTIFICATION OF TRANSCRIPT OF PROCEEDINGS BEFORE THE PRICE ADMINISTRATOR

The undersigned, Leon Henderson, does hereby certify that, pursuant to the Emergency Price Control Act of 1942 (P. L. 421, 77th Cong., 2d Sess.), he is the duly appointed, qualified, and acting Price Administrator of the Office of Price Administration and that the within and foregoing Transcript of Proceedings is a true and correct transcript of such portions of the proceedings before the Price Administrator in connection with the protest of Davies Warehouse Company, a corporation, Docket No. GF1–428–P, as are material under the complaint.

Dated at Washington, D. C., this 4th day of September, 1942.

(Sgd.) LEON HENDERSON,
Leon Henderson,
Administrator.

(94)

U. S. GOVERNMENT PRINTING OFFICE: 1942

UNITED STATES EMERGENCY COURT OF APPEALS

No. 5

DAVIES WAREHOUSE COMPANY, a Corporation, COMPLAINANT

v.

PRENTISS M. BROWN, PRICE ADMINISTRATOR, RESPONDENT

Heard January 25, 1943 Decided May 28, 1943

Mr. Reginald L. Vaughan, for complainant.

Mr. W. R. Ming, Jr., Attorney, with whom *Messrs. David Ginsburg*, General Counsel, *Thomas I. Emerson*, Associate General Counsel, *Nathaniel L. Nathanson*, Assistant General Counsel, *Ben W. Heineman*, Chief, Court Review Branch, *Carl H. Fulda* and *H. H. Schneider*, Attorneys, all of the Office of Price Administration, were on the brief, for respondent.

Before VINSON, Chief Judge, and MARIS and MAGRUDER, Judges.

MARIS, Judge: Complainant conducts the business of a public warehouse in the City of Los Angeles, California. Its business is declared by both constitution[1] and statute[2] of California to be that of a public utility subject to regulation by the railroad commission of the state. That regulation includes the fixing of rates and charges of the complainant. Pursuant to the California statute the railroad commission on May 12, 1942 authorized complainant to make an increase in its existing rates, effective May 22, 1942.

On April 28, 1942 the Price Administrator acting under the authority conferred upon him by the Emergency Price Control Act of 1942 issued a General Maximum Price Regulation[3] which fixed as seller's maximum prices for any commodity or service the highest price charged by him during the month of March, 1942. Section 10 of the regulation, as amended,[4] provided that it should not apply to such services as might be specified by supplementary regulations or amendments thereto.

Section 302(e)(2) of the Emergency Price Control Act of 1942 (50 U. S. C. A. App. § 942(e)(2) provides:

> "(e) The term 'commodity' . . . includes services rendered . . . in connection with the . . . storage . . . of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity: *Provided*, That nothing in this Act shall be construed to authorize the regulation of . . . (2) rates charged by any common carrier or other public utility . . ."

[1] Constitution of California, Art. IV, § 33, Art. XII, § 23.

[2] Public Utilities Act of California, §§ 2(aa), 2(dd), 2½, 14, 15, 63a.

[3] 7 F. R. 3153.

[4] 7 F. R. 4738.

On June 18, 1942 the Price Administrator issued Supplementary Regulation No. 11[5] by which it was declared that the General Maximum Price Regulation would not apply to certain services until July 1, 1942. Among the services thus treated were "(2) Commercial Storage and warehousing and services incident thereto." On June 25, 1942 the Price Administrator issued Amendment No. 1[6] to Supplementary Regulation No. 11 providing for the exception of certain services from the operation of the General Maximum Price Regulation, effective July 1, 1942. Of the services thus excepted the only ones partaking of the nature of a common carrier or other public utility were the following:

"(21) Electricity (companies furnishing as public utilities), rates charged by

. . .

(25) Express companies and freight forwarders offering their services to the general public as common carriers, rates charged by

. . .

(30) Gas (companies supplying, as public utilities through mains), rates charged by

. . .

(38) Light, heat, or power (companies furnishing, as public utilities), rates charged by

. . .

(61) Telephone services, rates charged for
(62) Telegraph service, rates charged for

. . .

(68) Transportation of commodities by persons offering their services to the general public as common carriers by rail, water, motor, pipe line, or other means of conveyances, rates charged for: *Provided*, however, that charges for storage and warehousing and all other services incident thereto by any person shall not be excluded from the General Maximum Price Regulation.
(69) Transportation of persons, rates charged for

. . .

(73) Water (companies supplying, to urban areas as public utilities), rates charged by."

The effect of the General Maximum Price Regulation, the Supplementary Regulation and the amendment, as applied to the complainant, was to prohibit it after July 1, 1942 from taking advantage of the rate increase which had been allowed to it by the California Railroad Commission two months previously. Asserting itself to be a public utility within the meaning of the exemption of "any common carrier or other public utility" set forth in Section 302(c)(2) of the act and therefore aggrieved by the failure of the Price Administrator to exempt its business from the General Maximum Price Regulation, the complainant filed a timely protest with the Price Administrator. The Price Administrator denied the protest and the complainant filed the present complaint asking this court to set aside the General Maximum Price Regulation, Supplementary Regulation No. 11 and Amend-

[5] 7 F. R. 4543.
[6] 7 F. R. 4738.

ment No. 1 thereto insofar as they purport to regulate the charges of the complainant.

It is the contention of the complainant that the words "any common carrier or other public utility" as used in the exemption clause of section 302(c)(2) of the act mean any common carrier or other public utility which is designated as such by existing law and regulated as to its rates by existing federal, state or municipal authority. The Price Administrator contends, on the other hand, that the interpretation of these words is not dependent on state law but that they must be given a uniform effect throughout the United States and must therefore be deemed to refer to all common carriers and other public utilities generally and traditionally recognized as such without regard to whether in a particular state they are or are not subject to rate regulation by statutory authority. It is the Price Administrator's further contention that the business of a public warehouseman is not a public utility in this sense, even though in California it is by statute described and regulated as such. Consequently, he says, the complainant is not entitled to exemption from his price regulation as a public utility and its complaint should be dismissed.

The question thus presented for our decision is as to the meaning to be given to the words "any common carrier or other public utility" in the exemption clause of the act. Are these words to be given their natural and ordinary meaning and applied uniformly throughout the nation or are they to be deemed to refer only to those businesses which have been designated as common carriers or public utilities by some other law and which have been made subject to rate regulation by existing federal, state or local authorities? If the former, do they include the business of a public warehouseman? It will first be observed that neither "common carrier" nor "public utility" is defined by the act. There is no contention that the complainant is a common carrier. Consequently that phrase need concern us no further. Accordingly we must proceed to ascertain the concept which the Congress had in mind in using the phrase "public utility" in the exemption clause of the act.

It need hardly be pointed out that the act was passed in the emergency of war to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices. The threatened danger of disastrous inflation was and is nationwide and not local in character and the evident purpose of the act was to empower the Price Administrator to take needed action to combat it on a national scale. In this setting there is especially cogent reason for the application of the well established rule that descriptive terms used in a federal statute will, in the absence of language in the statute indicating a contrary intent, be given a general and uniform interpretation throughout the country.[7] The same considerations make equally applicable the rule that exceptions to a general policy embodied in a law should be

[7] Lyeth v. Hoey, 305 U. S. 188, 194 (1938). The rule has been quite recently reiterated by the Supreme Court, speaking through Justice Douglas, in Jerome v. United States, — U. S. — (1943), as follows: "But we must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law. That assumption is based on the fact that the application of federal legislation is nation wide (United States v. Pelzer, 312 U. S. 399, 402) and at times on the fact that the federal program would be impaired if state law were to control."

strictly construed.[8] Here there is no indication that the Congress intended that the Price Administrator's power to fix the prices charged by a business should be dependent upon whether or not in the state in which the business was carried on it was described as a public utility and regulated as such. Particularly in the light of the wide variety of businesses which have been designated and regulated as public utilities in some of the states[9] there is compelling force in the Price Administrator's argument that under such an interpretation of the act unjustified economic preferences, regional competition and other evils might well result. Likewise we find no indication that the Price Administrator was intended, as the complainant argues, to fix the rates of all common carriers and other public utilities whose rates are not otherwise regulated.[10]

We find in the act other indications of the Congressional intent that its application should be uniform throughout the country. Thus we observe that the exceptions to the broad sweep of the coverage of the act which appear in the proviso to Section 302(c) are very few in number. Then also the act expressly deprives all existing courts, federal and state, of jurisdiction to review the Price Administrator's regulations and confers sole jurisdiction in that field upon this court; a plain indication that Congress intended that a single standard of review of price regulations should be applied uniformly throughout the nation.

But even more persuasive is the fact that the exemption clause is wholly devoid of any qualifying language which would indicate that the Congress intended it to have a varying local application. The Congress did not, as it might have done,[10a] say that the public utilities

[8] Spokane & Inland R. R. v. United States, 241 U. S. 344, 350 (1916).

[9] Among the businesses which have been designated by state statutes as public utilities and regulated as such are the following: *abbatoirs*—N. C., Code of 1939, § 2832; *airports*—Fla., Stat., 1941, § 180.07; *armories*—N. C., Code of 1939, § 2832; *auditoriums*—N. C., Code of 1939, § 2832; *cemeteries*—N. C., Code of 1939, § 2832; *collecting systems*—Fla. Stat., 1941, § 180.07; *cotton gins*—Okla., Stat., Title 17, § 41; *creosoting and other paving works*—Minn., Mason's Stat. 1927 § 1786; *disposal works*—Fla., Stat., 1941, § 180.07; *distribution systems*—Fla., Stat., 1941, § 180.07; *docks* (*public*) Ala., Code of 1940, Title 48, § 302; *garbage and sewage disposal plants*—N. C., Code of 1939, § 2832; *golf courses*—Fla., Stat., 1941, § 180.07; *hospitals*—Fla., Stat., 1941, § 180.07; *ice plants*—Minn., Mason's Stat. 1927, § 1786; *intakes*—Fla., Stat., 1941, § 180.07; *jails*—Fla., Stat., 1941, § 180.07; *libraries*—N. C., Code of 1939, § 2832; *market houses*—N. C., Code of 1939; § 2832; *markets* (*public*) Minn., Mason's Stat. 1927, § 1786; *parks*—N. C., Code of 1939 § 2832; *play or recreation grounds*—N. C., Code of 1939, § 2832; *pipe lines*—Fla., Stat. 1941, § 180.07; *pumping stations*—Fla., Stat., 1941, § 180.07; *purification works*—Fla., Stat., 1941, § 180.07; *reservoirs*—Fla., Stat., 1941, § 180.07; *schools*—N. C., Code of 1939, § 2832; *sewerage*—Fla., (sewerage systems and intercepting sewers), Stat., 1941, § 180.07.—Minn., (sewer systems), Mason's Stat., 1927, § 1786,—N. C., (sewer systems) Code of 1939, § 2832; *slaughtering establishments*—Minn., Mason's Stat., 1927, § 1786,—N. C. (slaughter houses) Code of 1939, § 2832; *stone quarries and crushing works*—Minn., Mason's Stat., 1927 § 1786; *toll bridge or road*—Ala., Code of 1940, Title 48, § 302(8); *terminal* (*public*)—Ala., Code of 1940, Title 48, § 302(7); *wharves*—Ala., (public wharves) Code of 1940, Title 48, § 302(7)—N. C., Code of 1939, § 2832; *wells*—Fla., Stat., 1941, § 180.07.

[10] The acceptance of this view would in effect make of the Price Administrator a public utility commission for the State of Delaware in which state there is now no state regulation of the rates of common carriers or other public utilities.

[10a] Cf. Keifer & Keifer v. R. F. C., 306 U. S. 381, 395 (1939).

which were to be exempt from the operation of the act should be those businesses, and those alone, which were deemed to be public utilities and subject to rate regulation as such under existing federal or state law. Furthermore we think that such a definition of the term "public utility" would have extended its meaning far beyond anything that the Congress could have had in mind. For the use of the term by some of the states has been so broadened that in one of them, to cite an extreme case, it is defined to include "every corporation, or person, now or hereafter declared by law to be affected with a public interest."[11] But it is settled that the mere exercise of a state's power to regulate the rates and charges of a particular business which the state deems to be affected with a public interest does not constitute such a business "in the accepted sense of the phrase, a public utility." Nebbia v. New York, 291 U. S. 502, 531 (1934).

The legislative history of the act also lends support to the view that the Congress intended to exempt from the operation of the act all public utilities even though not subject to other existing regulation. Thus in the hearings before the House Committee on Banking and Currency the following testimony was given by Leon Henderson, then acting as Administrator of the Office of Price Administration and Civilian Supply under Executive Order:[12]

> "Mr. Henderson. * * * Now, as to the utilities. There is, as the members are aware, an adequate set of regulations as to the charges which utility companies can make. These, again, are based upon a long series of judicial determinations, of State regulations, and of State laws. It seemed to those drafting the bill that this was an area which was not likely to give difficulty or to cause, so far as they could see at that time, any inflationary trend. The bill is designed to control an emergency inflationary situation and has left them out, just as it has transportation rates. There are questions peculiar to utilities and none of them, so far as I see at the present time, would make necessary further regulation by means of a price-control bill."
>
> . . .
>
> "Mr. Patman. I do not care for an extended answer, unless you think it is necessary to give it.
>
> You include in this bill metals, chemicals, durable goods, and agricultural products, and you also include services in the bill except, of course, that it does not apply to wages and salaries paid by an employer to an employee; but otherwise services are included. But it does not include transportation or utility rates.
>
> Mr. Henderson. No.
>
> Mr. Patman. That is quite a large item, and you said, as I understood you, that you were satisfied with the rate-making bodies in the States, and that that was the reason you did not ask that utility and transportation rates be included.
>
> Do I understand that correctly?
>
> Mr. Henderson. I did not mean to limit it to existing regulatory mechanisms both in transportation and utilities.

[11] Colorado, Stat. Ann. (1935), Ch. 137 § 3.

[12] Excerpts from transcript of hearings before the Committee on Banking and Currency of the House of Representatives held on August 6 and 15, 1941, pp. 54, 55, 626, on H. R. 5479 (superseded by H. R. 5990), 77th Cong. 1st Sess.

> What I said was that the transportation rates themselves were already under regulation by Federal and State agencies, and I also feel that that is not an item, even in the absence of that regulation, to be brought under commodity price regulation."

In the House of Representatives Representative Steagall, the Chairman of the Committee on Banking and Currency, who was in charge of the bill on the floor, said:[13]

> "Mr. Steagall. The bill also provides explicitly in section 302(c) that nothing in the act is to be construed to authorize the regulation of compensation paid by an employer to any of his employees, or the regulation of rates charged by any common carrier, or other public utility, which are usually subject to adequate control by State or other Federal agencies. In cases of conflict between State regulation of enterprise of a non-public-utility character and Federal regulation under this bill, the Federal regulation would, of course prevail."

We think these statements indicate that what the Congress had in mind was the exemption of all public utilities as ordinarily understood. From the statements of both Mr. Henderson and Mr. Steagall it is evident that they contemplated that some of the public utilities which they proposed to exempt might not be presently subjected to other rate regulation. Nevertheless it was thought that the public utilities did not present a serious price control problem "even in the absence of that regulation." In reaching this conclusion the Congress may well have had in mind what Mr. Henderson's testimony suggested, namely, that public utility rates "are based upon a long series of judicial determinations" even though not subject to statutory regulation. For it is well established that at common law a business of a public nature and invested with a monopoly was under the duty of furnishing its service to the public at reasonable rates.[14] And this duty has been enforced in equity.[15] Consequently it was entirely reasonable to leave out of the price fixing procedure set up by the statute the whole area of public utility rates, since most of them were already subject to statutory regulation and the remainder were limited by fixed principles of law.

Finally we cannot overlook the fact that by Amendment No. 1 to Supplemental Regulation No. 11, the Price Administrator granted complete exemption to nine classes of common carriers and other public utilities without any regard to their status as to existing rate regulation. This contemporaneous administrative construction of the scope of the exemption appears to have met with the approval of the Congress, for in Section 1 of the amendatory act of October 2, 1942,

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[13] Congressional Record, Vol. 87, p. 9308.

[14] Allnutt v. Inglis, 12 East. 527 (1810), 104 Eng. Repr. 206. For an illuminating discussion of this common law duty see McCurdy, The Power of a Public Utility to fix its Rates and Charges in the absence of Regulatory Legislation, 38 Harv. L. Rev. 202 (1924), especially pp. 206, 207 and note 12, in which the cases are collected.

[15] City of Madison v. Madison Gas & Electric Co., 129 Wis. 249, 108 N. W. 67 (1906), and cases therein cited.

Chap. 578, 2d Sess., 77th Cong.,[16] the words "common carrier or other public utility" are again used without qualifying language. It is true, as the complainant says, that these words were used in connection with a provision requiring a public utility making a general increase in rates to give notice to a federal agency and to consent to the intervention of the agency "before the Federal, State, or municipal authority having jurisdiction to consider such increase." But this clause must be considered in the light of the fact that the provision was intended to give to the federal authorities an opportunity to prevent undue increases in utility rates in cases in which no such opportunity was afforded by the original act. The provision was substituted in conference for an amendment by Senator Norris which would have given the President veto power over such increases.[17] In view of its purpose to extend the area of federal action it can hardly be construed as at the same time intended to restrict that area by enlarging the original exemption of public utilities so as to include in the exempt class all those businesses which are described and regulated as public utilities under the statutes of any state. The act must rather be considered in the light of the fact that the traditional public utilities are almost universally subject to statutory rate regulation and if not are subject to a common law duty to maintain reasonable rates which duty is enforceable by the courts. Indeed the courts may well be included among the state authorities having jurisdiction to consider rate increases before which the act provided that the federal agency should be given the right to intervene.

We conclude, therefore, that the exemption of public utilities by Section 302(c)(2) was intended to have a uniform meaning and effect throughout the United States without regard to the provisions of state law, and that the fact that the complainant is designated as a public utility by the constitution and laws of California is not determinative of its right to the exemption. The question remains whether a public warehouseman, such as the complainant, is a public utility within the uniform nationwide meaning which is to be given to that term as it is used in the Emergency Price Control Act.

Our investigation indicates that the use of the phrase "public utility" in the sense in which we are now considering it is of comparatively recent origin.[18] The data which we have considered do not disclose any clear criteria from which a precise definition of the phrase "public utility" may be constructed. It is suggested that one of the elements is the enjoyment of a public franchise to carry on the business in question. It is clear, however, that public franchises may also be held by those whose activities are public utilities solely in the

[16] "The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided*, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase."

[17] See statements of Senator Norris, Cong. Record, Vol. 88, pp. 7343-7346 and of Senator Brown, Cong. Record, Vol. 88, pp. 7970, 7971.

[18] See Goddard, The Evolution and Devolution of Public Utility Law, 32 Mich. L. Rev. 577, 578 (1934).

sense that they are state regulated. Certainly any person who is by statute authorized to operate his business only upon receipt of a state issued certificate of convenience and necessity may be said to have a franchise from the state. Then again it is urged that monopoly and its attendant lack of competition are essential marks of a public utility. But while monopoly and lack of competition are present in the case of some undoubted public utilities, there are others, carriers by motor vehicle for example, whose business is highly competitive.

Finally it is suggested that the legal duty to serve without discrimination all those who desire the service is the unmistakable badge of a public utility. While all public utilities doubtless have such a duty it is by no means confined to them. Thus inkeepers, who have nowhere been described as public utilities, have from early times been subject to the obligation to receive and afford proper entertainment to every one who offers himself as a guest, if there be sufficient room for him in the inn, and no good reason for refusing him.[19] Nor is the concept of one engaged in a public employment of assistance. At common law the surgeon, the tailor, the smith, the victualer, the baker, the miller, the innkeeper, the carrier, the ferryman and the wharfinger were considered to be engaged in public employment[20] yet the first seven of these have never been suggested as coming within the definition of public utility.

Some light is thrown upon the question whether a public warehouseman is a public utility within the meaning of the act by the language of the act itself. As we have seen, the very section which contains the proviso exempting public utilities states that the term "commodity" as used in the act "includes services rendered . . . in connection with the . . . storage . . . of a commodity." Here is definite indication that storage of commodities, the business of a public warehouseman, is intended to be covered by the act. In the hearings upon the bill and in its consideration upon the floor of the Senate the public utilities referred to as involved in the proposed exemption included electric, gas, water and telephone companies but no mention was made of public warehousemen.

It is a fundamental rule of statutory construction that in the absence of a statutory definition, words used in the statute are to be given their natural and ordinary meaning.[21] Among the data to be considered in determining the natural and ordinary meaning of "public utility" is the manner in which the term has been used in state legislation.[22] Electric, gas, light, heat, power, water, telephone and telegraph companies which the Price Administrator has treated as exempt public utilities are enterprises of the types which are now almost universally treated as public utilities for the purpose of regulation under state statutes. They are generally classified as public utilities in the manuals used by the financial community.[23] On the other hand only three states include all warehouses in their statutory

[19] Hawthorn v. Hammond, 1 C. & K. 404 (1844); Rex v. Ivens, 7 Car. & P. 213 (1835); Gordon v. Silber, 25 Q. B. D. 491 (1890); 28 Am. Jur., Innkeepers, § 46; 32 C. J., Innkeepers § 28.

[20] Wyman, Public Service Corporations §§ 6-16, incl.

[21] Ozawa v. United States, 260 U. S. 178, 194 (1922).

[22] Cf. Eagan v. Commissioner of Internal Revenue, 43 F. 2d 881, 883 (C. C. A. 5, 1930).

[23] Cf. Moody's Manual of Public Utilities (1942 Ed.) p. a3.

definition of public utilities,[24] while seven others include limited types of warehouses.[25] Thirty-eight states and the District of Columbia do not define warehouses of any kind as public utilities. In the financial manuals warehouse companies are classified as industrials.[26]

Complainant points to the decision of the Supreme Court in Munn v. Illinois, 94 U. S. 113 (1876) which held that the rates of a public warehouseman were subject to regulation by a state and it argues that its business was thereby adjudicated to be a public utility. The decision in the Munn case was based upon the proposition that such a business was "affected with a public interest" and consequently its charges might be regulated by the state under the police power without violation of the Fourteenth Amendment. The court did not discuss the question as to whether the business was a public utility. Indeed that term was not used in the opinion. We need not here enter the interesting controversy as to whether the use in that decision of Sir Matthew Hale's concept of a business "affected with a public interest" was appropriate,[27] for the concept has subsequently been broadened by the Supreme Court to be the equivalent of "subject to the exercise of the police power."[28] It follows that today a purely private business which has no franchise from the state and enjoys no monopoly may be subject to price regulation as a business affected with a public interest if a reasonable basis for such action can be shown. As the court said in the Nebbia case (p. 536) "The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good."

Pursuant to this broader concept of the police power many of the states have in recent years widely extended the area of price regulation. In so doing, as in the case of California with public warehousemen, they have frequently described the businesses thus regulated as public utilities. Whether this was in the mistaken belief that it was necessary to so designate them in order to bring them within the police power is not material, for it is obvious that this greatly widened field of regulated business could not have been intended by Congress to be comprehended within the meaning of the phrase "public utility" as used in the act. Such a construction would remove from the jurisdiction of the Price Administrator a major portion of the field of price regulation and make the exemption clause the rule rather than the exception. Indeed, it may be said that the Emergency Price Control Act itself is a Congressional determination that, at least in wartime, every business in the country is so affected with a public interest as to require statutory control of its prices.

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[24] California—Gen. Laws (Deering, 1937), Act 6386, § 2 (dd); Indiana—Stat. Ann. (1933, Burns), §§ 67-501, 67-201, 67-202; South Dakota—Code (1939), § 52.0201.

[25] Idaho—Code Ann. (1932), §§ 59-128, 59-129; Illinois—Stat. Ann. (Jones), §§ 141.001(1), 141.011; Maine—Rev. Stat. (1930) Ch. 62, p. 1031; Nevada—Comp. Laws (1929), § 6106; North Dakota—Comp. Laws (Supp. 1913-1925), § 4609e2; Utah—Rev. Stat. (1933), § 76-2-1; Washington—Rev. Stat. Ann. (Rem.), § 10344.

[26] Cf. Moody's Manual of Industrials (1942 Ed.) pp. a83, a91.

[27] See the discussion of this question by McAllister, Lord Hale and Business Affected with a Public Interest, 43 Harv. L. Rev. 759 (1930) and by Hamilton, Affectation With Public Interest, 39 Yale L. J. 1089 (1930).

[28] Nebbia v. New York, 291 U. S. 502, 533 (1934).

Professor (now Justice) Frankfurter in his book "The Public and its Government" (1930) p. 81, lists as typical public utilities those enterprises "which furnish light, heat, power, water, transportation, and communication." These, as we have seen, are the types of business which the Price Administrator has exempted as public utilities. We think that the Congress intended by the phrase "public utility" to comprehend enterprises of these general types. We are not called upon, however, to delimit the entire area which the term was intended to cover, but merely to decide whether a public warehouseman is within it. After consideration of all the relevant data we conclude that a public warehouseman operating under the California law is not a "public utility" within the meaning of Section 302(e)(2) and as such exempt from the General Maximum Price Regulation promulgated by the Price Administrator. It follows that the latter committed no error in denying the complainant's protest.

The complaint is dismissed.

MAGRUDER, J. With some hesitation, I concur in the result reached by Judge Maris. This is one of those unfortunate cases where doubts would remain whichever way the case was decided.

Judge Vinson in his dissenting opinion has amply demonstrated that complainant has the characteristics of a "public utility" within the connotation of that phrase in widespread usage. He treats the phrase as one of art, and so treating it, he is sure only of this, if I understand him correctly: that a business is a "public utility" if it has all four of the characteristics mentioned, and if, in addition, its rates are actually being regulated by some administrative agency. He does not decide whether a business would be exempt within the meaning of § 302(e) if its rates were not in fact being regulated by some governmental agency, even though it had the four described characteristics. And he suggests the possibility that a business might be deemed a "public utility" even though not possessing one or another of the four characteristics—for instance, if the business, though possessing the other earmarks, did not bear an intimate connection with the process of transportation and distribution, or was not required to obtain a certificate of convenience or necessity before entering the field.

If Judge Vinson's view were accepted, the Price Administrator would have a formidable preliminary task before issuing price regulations applicable to a great variety of businesses. He would have to decide what are the indispensable characteristics of a "public utility"—a phrase which Judge Vinson, after exhaustive research, concedes to be "freighted with refinements" and "not susceptible of precise definition." Then the Administrator would have to scrutinize the statutes of the forty-eight states to see what businesses have had impressed upon them by local law the characteristic obligations of a public utility. Nor would his investigation end there; Judge Vinson points out that the due process clause limits "the power of the states to create public utilities," and the Administrator would have to wrestle with the application of the Supreme Court's decision in *New State Ice Co.* v. *Liebmann*, 285 U. S. 262.

But I think a candid examination of the legislative history indicates that Congress in § 302(e) was probably not using "public util-

ity" as a term of art; if it had been, Congress would hardly have left without precise definition so elusive a phrase. Congress was, I am inclined to think, using the term loosely and somewhat vaguely as comprehending the familiar and garden variety businesses which would immediately suggest themselves to the lay mind when the phrase "public utility" is used, and which universally, or almost universally, are under existing federal, state or municipal rate regulation. In these circumstances we should attach persuasive weight to the official interpretation of the exemption in § 302(e), made shortly after the passage of the Act by the administrative official who sponsored the legislation and upon whom Congress imposed the duty of carrying it out. It is significant in this connection, as pointed out by Judge Maris, that after the Administrator made his contemporaneous interpretation of the scope of the exemption, Congress in § 1 of the amending act of October 2, 1942 (56 Stat. 765), again used the words "common carrier or other public utility" without qualifying language.

Judge Maris concurs in the foregoing views.

VINSON, *Chief Judge*, dissenting: The Emergency Price Control Act of 1942, as amended (the Price Act), contains a provision[1] which specifically exempts the rates charged by "*any common carrier or other public utility*" from regulation by respondent, the Price Administrator. The term, "public utility," is not defined or otherwise explained in the Act. The hearings and debates in Congress have not provided specific guidance as to the comprehensiveness with which the term was employed.

In the present controversy the complainant, which conducts the business of a public warehouse in the City of Los Angeles, California, contends that it is a "public utility," and, therefore, entitled to exemption from rate control under the terms of the Act.

The relevant portions of the Price Act are Section 2 (a), which authorizes the respondent to issue price regulations for *commodities* whose price has risen or threatens to rise in a manner inconsistent with the purposes enumerated in Section 1 (a)[2] of the Act, together with Section 302 (e) (2) which provides that

> . . . The term "commodity" . . . includes services rendered . . . in connection with the processing, distribution, *storage* . . . of a commodity: *Provided*, That nothing in this Act shall be construed to authorize the regulation of . . . (2) rates charges by any common carrier or other public utility . . .[3] (Italics supplied)

By virtue of the aforesaid authorization, the Price Administrator on April 28, 1942, issued a General Maximum Price Regulation[4] which fixed as a seller's maximum price the highest price charged by him

[1] January 30, 1942, c. 26, Sec. 302 (e), 56 Stat. 36; 50 U.S.C.A. (App.) Sec. 942 (e).

[2] January 30, 1942, c. 26, Sec. 1 (a), 56 Stat. 23; 50 U.S.C.A. (App.) 901 (a).

[3] Footnote 1, *supra*.

[4] 7 F. R. 3153.

during the month of March, 1942. Section 10 of the Regulation[5] provided that it should not apply to such services as might be specified by supplementary regulations or amendments thereto. On June 18, 1942, the Price Administrator issued Supplementary Regulation No. 11,[6] by which it was declared that the General Maximum Price Regulation (issued in April) would not apply to certain services until July 1, 1942. Among the services thus treated were "(2) Commercial storage and warehousing and services incident thereto:" On June 23, 1942, the Price Administrator issued Amendment No. 1[7] to Supplemental Regulation No. 11, providing for the exception of certain services from the operation thereof. Among the services thus excepted were all electricity, gas, light, heat, power, and water companies which were furnishing or supplying "as public utilities." In addition, the Amendment provided the following exemption:

> (68) Transportation of commodities by . . . common carriers by rail, water, motor, pipe line, or other means of conveyances, rates charged for: *Provided, however*, That *charges for storage and warehousing* and all other services incident thereto by any person shall *not* be excluded from the General Maximum Price Regulation. (Italics supplied)

The upshot of this series of regulations was to place complainant in a position wherein it would be prohibited after July 1, 1942, from taking advantage of a rate increase for its warehousing services which had been allowed by the California Railroad Commission two months previously. Asserting itself to be a public utility within the meaning of the exemption set forth in Section 302 (c) of the Act, and therefore aggrieved by the failure of the Price Administrator to exempt its business from the General Maximum Price Regulation, the complainant filed a timely protest[8] with the Price Administrator. The Price Administrator denied the protest, and the complainant filed the present complaint asking this court to set aside the General Maximum Price Regulation, Supplementary Regulation No. 11, and Amendment No. 1 thereto, insofar as they purport to regulate the charges of the complainant.

The parties agree that, in the absence of statutory definition or other means of attaining the legislative intention, the term "public utility," as used in the Act, must be given its natural and customary significance. We are obliged to determine, in a measure, this connotation.

The term "public utility" is not susceptible of a precise definition. It is a concept of comprehensive content, freighted with refinements, and one whose determination for general application is beyond the scope of this opinion. Fixing its formula has been frequently dodged. It is not our purpose or need, however, to develop the definition to a conclusion—to present a workable formula or pattern by which any business may be gauged and labeled.

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5 7 F. R. 3155.

6 7 F. R. 4543.

7 7F. R. 4738.

8 As provided for in Sec. 203 of the Act, 56 Stat. 31, C. 26, sec. 203; 50 U. S. C. A. (App) 923. Although respondent granted complainant the increase allowed by the California Commission two days after denial of the protest, he has the right under Sec. 204 (a) to modify or rescind that order at any time.

I do not regard a public utility as having any tangible existence; it is like a corporation in that respect. The concept "public utility" is, as I see it, merely a bundle of attributes or characteristics, and our problem, here, simply stated is first to consider some of the fundamental attributes which comprise that bundle and, then, to see if these attributes have been applied, affixed, or adopted as regards the complainant's public warehouse.

I. *A Public Utility is, at the least, a Business Affected with a Public Interest.*

In the narrowing process of determining which of the countless enterprises extant are public utilities, I think that the most appropriate spring board is that principle contained in the landmark case of *Munn* v. *Illinois*.[9] A public utility is, at the least, a business affected with a public interest.[10] A "business affected with a public interest," however, is a concept no more concise than the one with which we are concerned. It has been described as a business which bears such a peculiarly close relation to the public that there arises an affirmative obligation upon the part of the operators to be reasonable in dealing with their customers.[11] It has been designated as a business wherein exist peculiar conditions bearing such a substantial and definite relation to the public interest as to justify an indulgence of the legal fiction of a grant by the owner to the public of an interest in the use,[12] and permitting the imposition of governmental regulation. Thus although the property continues to be private, the public has attained an interest. It has been observed that there is perhaps not a single business which may not be subjected to some measure of public regulation.[13] It is simply a question of the character and degree of the control, and an activity properly designated as "affected with a public interest" is subject to more extensive regulation. The mere declaration by the legislature, however, that a business is affected with a public interest is not conclusive; the attempted regulation is always a subject of judicial inquiry,[14] the due process clause being the staying hand.[15]

Some clarification of the concept is found in *Wolff Packing Co.* v. *Industrial Court*,[16] wherein the Supreme Court said:

> It is very difficult under the cases to lay down a working rule by which readily to determine when a business has become "clothed with a public interest." All business is subject to some kinds of public regulation; but when the public becomes so peculiarly dependent upon a particular business that one engaging therein subjects himself to a more intimate public regula-

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[9] 94 U. S. 113.

[10] Nowata County Gas Co. v. Henry Oil Co., 269 Fed. 742, 746 (1920) (C.C.A. 8th).

[11] Wolff Co. v. Industrial Court, 262 U. S. 522, 536.

[12] Tyson & Brother v. Banton, 273 U. S. 418, 438. Cf. Munn v. Illinois, 94 U. S. 113, 126.

[13] New State Ice Co. v. Liebmann, 285 U. S. 262, 273.

[14] Tyson & Brother v. Banton, 273 U. S. 418, 431; Wolff Co. v. Industrial Court, 262 U. S. 522, 536, 539.

[15] New State Ice Co. v. Liebmann, 285 U. S. 262, 302.

[16] 262 U. S. 522, 538, 539.

> tion is only to be determined by the process of exclusion and inclusion and to gradual establishment of a line of distinction. . . . To say that a business is clothed with a public interest, is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation.

No particular manner of operation or form of state control seems to be a requisite characteristic of a business affected with a public interest. It has been held that a business was impressed with a public interest even though the public might not have the right to demand and receive service.[17] The enjoyment of a monopolistic status is clearly not necessary.[18] Similarly it has been held that a business need not be dependent upon a franchise, certificate of public convenience and necessity, or other form of grant, in order to be clothed with a public interest.[19]

What, then, is it which distinguishes a public utility from a mere business affected with a public interest? The informing opinion of *Wolff Packing Company* v. *Industrial Court* has drawn a formal comparison and distinction which divides public businesses into three classes:

> (1) *Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.*
>
> (2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and grist mills. . . .
>
> (3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject

17 Tyson & Brother v. Banton, 273 U. S. 418, 434; German Alliance Insurance Co. v. Kansas, 233 U. S. 389.

18 Nebbia v. New York, 291 U. S. 502, 531, 534; Brass v. Stoeser, 153 U. S. 391, 403.

19 Nebbia v. New York, 291 U. S. 502, 531, 534; Munn v. Illinois, 94 U. S. 113.

in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly. . . .[20] (Italics supplied)

This oft-cited passage from the *Wolff* case purports to do no more than outline some of the fundamental distinctions between a public utility and a business affected with a public interest. It is necessary to develop those fundamental differences in order to appreciate fully the multiple refinements of the former concept.

II. *The Nature of the Enterprises in the Public Utility Family.*

The concept, "public utility," contemplates more than a business affected with a public interest.[21] To the date of my observation, at least, it has been limited in its application to only a particular class of public businesses. Because the explanation of this limitation is of historical origin, perhaps the best insight is afforded by referring, in brief, to the emergence and expansion of the public utility family. It is clear that the common carrier, by virtue of what was accepted as its duties and obligations to the public at common law, was the Adam of this family, and that the members thereof grew as the common carrier concept was extended. Transportation thus furnished the point of departure, and the list grew by analogy.[22] Congress may have recognized this intimate connection when it grouped "common carriers and *other* public utilities" (italics supplied) into a single exemption in Section 302 (e).

The participation by a business in activities *intimately connected with the processes of transportation and distribution*, therefore, was the characteristic which caused it to be subjected to the impositions implicit in public utility regulation. A somewhat exhaustive enumeration of the businesses which frequently have been designated, operated, and regulated as public utilities illustrates that the gradual growth of the family has involved no departure from the initial concept, but merely reflected scientific progress in the facilities, auxiliaries, and varieties of transportation and distribution: viz., bridges, buses, canals, cotton gins, docks, electric companies, elevators, express companies, ferries, gas companies; heating companies, pipe lines, public warehouses, railroads, stockyards, truck lines, telegraphs, telephones, water companies, wharfingers, vessels, etc.

As supplying Supreme Court recognition of this approach, the language of Lamar, J., dissenting in the Supreme Court decision of *German Alliance Co.* v. *Kansas*,[23] is significant:

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[20] 262 U. S. 522, 535.

[21] But see Dissent of Brandeis, J. in *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 283; State v. Barnes, 22 Okl. 191, 97 Pac. 997.

[22] See G. H. Robinson, The Public Utility Concept in American Law (1928), 41 Harv. L. Rev. 278, and the authorities therein cited.

[23] 233 U. S. 389, 426.

> . . . And as further pointing out the characteristics of the public use justifying the fixing of prices, it will be noted that . . . they all have direct relation to the business or facilities of transportation or distribution—to transportation by carriers of passengers, goods or intelligence by vehicle or wire;—to distribution of water, gas or electricity through ditch, pipe or wire; to wharfage, *storage* or *accommodation of property before the journey begins, when it ends, or along the way.*
>
> When thus enumerated, they appear to be grouped around the common carrier as the typical public business and all employing in some way property devoted to a public use. (Italics supplied)

On the other hand, such decisions of the Supreme Court as those holding the business of selling milk[24] and insuring against fire losses[25] to be affected with a public interest illustrate the proposition that, as regards a mere business affected with a public interest, the traditionally close association with transportation and distribution service is not a necessary characteristic.

III. *For an Enterprise to be Constituted a Public Utility, Its Services Must be Made Available Upon Demand at Reasonable and Non-Discriminatory Rates.*

An examination of numerous decisions wherein Federal and State courts have had occasion to consider the nature and the characteristics of public utility enterprises reveals that a distinguishing feature of that class of businesses is considered to be the presence of an obligation to serve the public upon demand[26] at reasonable[27] and non-discriminatory[28] rates. In considering a particular business, the

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[24] Nebbia v. New York, 291 U. S. 502.

[25] German Alliance Insurance Co. v. Kansas, 233 U. S. 389.

[26] Wolff Co. v. Industrial Court, 262 U. S. 522, 535; Producers Transportation Co. v. Railroad Comm. of California, 251 U. S. 228, 231; Pulitzer Pub. Co. v. Federal Communications Comm., 66 App. D. C. 124, 126, 94 F. (2d) 249, 251; Depauw University v. Pub. Ser. Comm. of Oregon, 253 Fed. 848, 849; Batesville Telephone Co. v. Pub. Ser. Comm. of Indiana, 38 F. (2d) 511, 514, rev. 46 F. (2d) 226 (C.C.A. 7th), 284 U. S. 6; Publix Cleaners v. Florida Dry Cleaning and Laundry Board, 32 F. Supp. 33, 34; Parsons v. Detroit & Canada Tunnel Co., 15 F. Supp. 986, 997, aff. 92 F. (2d) 833 (C.C.A. 6th); Illinois Power & Light Corp. v. City of Centralia, 11 F. Supp. 874, 893, remanded 89 F. (2d) 985 (C.C.A. 7th); State ex rel Bricker v. Industrial Gas Co., 58 Ohio App. 101, 16 N. E. (2d) 218; Ocean Park Pier Amusement Corp. v. City of Santa Monica, 40 Cal. App. (2d) 76, 104 P. (2d) 668, 671, 879; Richardson v. Railroad Comm. of Calif., 191 Cal. 716, 218 Pac. 418, 420; Highland Dairy Farms Co. v. Helvetia Milk Condensing Co., 308 Ill. 294, 139 N. E. 418, 420; Ford Hydro Electric Co. v. Town of Aurora, 206 Wis. 489, 240 N. W. 418, 420; Southern Ohio Power Co. v. Public Utilities Comm. of Ohio, 110 Ohio St. 246, 143 N. E. 709, 701, 702; See Restatement of Torts (1934), Sec. 191, Comment a, b; Allen v. Railroad Comm. 179 Cal. 68, 175 Pac. 466, 474, cert. denied 249 U. S. 601.

[27] Parsons v. Detroit & Canada Tunnel Co., 15 F. Supp. 986, 997, aff. 92 F. (2d) 833 (C.C.A. 6th); Richardson v. Railroad Comm. of Calif., 191 Cal. 716, 218 Pac. 418, 420; Southern Ohio Power Co. v. Public Utilities Comm. of Ohio, 110 Ohio St. 246, 143 N. E. 709, 701, 702; Allen v. Railroad Comm., 179 Cal. 68, 175 Pac. 466, 474, cert. denied 249 U. S. 601.

[28] Parsons v. Detroit & Canada Tunnel Co., 15 F. Supp. 986, 997, aff. 92 F. (2d) 833 (C.C.A. 6th); Illinois Power & Light Corp. v. City of Centralia, 11 F. Supp. 874, 893, remanded 89 F. (2d) 985 (C.C.A. 7th); State ex rel Bricker v. Industrial Gas Co., 58 Ohio App. 101, 16 N. E. (2d) 218; Highland Dairy Farms Co. v. Helvetia Milk Condensing Co., 308 Ill. 294, 139 N. E. 418, 420.

greatest emphasis is repeatedly placed upon these characteristics. In *Parsons* v. *Detroit & Canada Tunnel Co.*,[29] to select one of the many expressions, a Federal court said:

> A public utility is generally known in the law as a business organization which regularly supplies the public with some commodity or service. *The distinguishing characteristic of a public utility* is the devotion of private property by the owner . . to such a use that the public generally, or that part of the public which has been served and has accepted the service, *has the right to demand that the use or service*, so long as it is continued, *shall be furnished without unreasonable discrimination* with reasonable efficiency and *under proper and reasonable charges*. (Italics supplied)

In *Nebbia* v. *New York*,[30] in denying that a dairy was a public utility "in the accepted sense," the Supreme Court spoke of a public utility as

> . . . a business . . . in which property is devoted to an enterprise of a sort which the public itself might appropriately undertake, or one whose owner relies on a public grant or franchise for the right to conduct the business, *or in which he is bound to serve all who apply* . . . . (Italics supplied)

In *Pulitzer Pub. Co.* v. *Federal Communications Commission*,[31] the United States Court of Appeals for the District of Columbia denied public utility status to radio broadcasting companies, observing that

> . . . we never have said that a radio broadcasting station is a public utility in the sense in which a railroad is a public utility. Generally speaking, that term comprehends *any facility* employed in rendering quasi public service such as waterworks, gas works, railroads, telephones, telegraphs, *etc. The use and enjoyment of such facilities the public has the legal right to demand;* but its right to the use and enjoyment of the facilities of a privately owned radio station is of a much more limited character. . . . The licensee of a radio station chooses its own advertisers and its own program. (Italics supplied)

In the California decision of *Allen* v. *Railroad Commission*,[32] the court, in discussing the public utility concept, dealt, for purposes of illustration, with the business of a butcher, excluding that business from the contested class on the following basis:

> . . . He (a butcher) still has the unquestioned right to fix his prices; he still has the unquestioned right to say that he will or will not contract with any member of the public. What differentiates all such activities from a true public utility *is this, and this only:* That the devotion to public use must be of such character that the *public generally*, or that part of it which has been served and which has accepted the service, *has the right to demand*

[29] 15 F. Supp. 986, 987; aff. 92 F. (2d) 833 (C.C.A. 6th).

[30] 291 U. S. 502, 531.

[31] Pulitzer Pub. Co. v. Federal Communications Comm., 68 App. D. C. 124; 126, 94 F. (2d) 249, 251.

[32] 179 Cal. 68, 175 Pac. 466, 474, cert. denied 249 U. S. 601.

that that service shall be conducted, so long as it is continued, with reasonable efficiency *under reasonable charges*. Public use, then, means the use by the public and by every individual member of it, as a legal right. Such is not only the accepted significance of the phrase by the great weight of authority as expounded by Mr. Lewis (Eminent Domain, sec. 164 et seq.), but is the definition repeatedly announced by this court. . . .

In *Terminal Taxicab Co.* v. *District of Columbia*,[33] the Supreme Court refused to consider garage call service in connection with taxicabs as a public utility, stating:

. . . But however it may have been in earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail an obligation to sell. It is assumed that an ordinary shopkeeper may refuse his wares arbitrarily to a customer whom he dislikes, and although that consideration is not conclusive . . . it is assumed that such a calling is not public as the word is used.

The Restatement of Torts adopts this classification:

Sec. 191. Comment:

a. *What constitutes a public utility.* What amounts to such a holding out to the public as to make an enterprise a public utility is beyond the scope of the Restatement of this Subject. The phrase public utility is used in the Restatement of this Subject to describe a person, corporation or other association carrying on an enterprise for the *accommodation of the public*, the members of which as such *are entitled as of right to use* its facilities. Usual instances of a public utility are common carriers, common innkeepers, telegraph and telephone companies and gas and electric companies. (Italics supplied)

b. A patron of a public utility is one who is exercising his right as a member of the public to make use of services of a public utility. . . .

The obligation to the public is restated in virtually every decision dealing with the subject matter. Unquestionably Congress was informed as to this criterion. Generally speaking, its members are as familiar with general substantive legal principles as are the courts—often they are better informed as to basic economic and business concepts. This imputation is more than a presumption. An excellent illustration of what Congress intends in its use and understanding of the term "public utility" is illustrated by a passage from the Foreign Trade Zones Act of 1934:[34]

Operation of zone as public utility; cost of customs service. Each zone shall be operated as a public utility, and all rates and charges for all services or privileges within the zone shall be fair and reasonable, and the grantee shall afford to all who may apply for the use of the zone and its facilities and appurtenances uniform treatment under like conditions. . . .

[33] 241 U. S. 252, 256.

[34] June 18, 1934, c. 590, Sec. 14, 48 Stat. 1001; 19 U.S.C.A. 81n.

I conclude, then, that a public utility is uniformly understood, aside from a particular statutory classification, to be, at least, a business affected with a public interest, closely associated with transportation or distribution, and under an obligation to afford its services to the public generally at reasonable and non-discriminatory rates. At this stage of the discussion, therefore, we are, in our quest for the concept in question, at these relative positions: We have removed public utilities at least two steps from the broader category of "business affected with a public interest," and at least three steps from the still broader category of "business in general."

IV. *Franchise and Monopoly.*

In the distinguished array of decisions wherein the concept has been defined, it has uniformly been considered one of the fundamental characteristics of a public utility that it be a business so constituted as to enjoy comparative freedom from commercial competition. This status is attained in two ways: (1) A business may practically succeed in eliminating its competitors, squeezing them out of the field or reducing their activities below the level of serious competition. Sometimes by preempting the field and by the exertion of economic pressure, a business may preclude the emergence of a serious competitor. (2) The state, itself, may place an enterprise in this status. The legislature may feel that the economic interests of the general public will be better served by curtailing the right to enter a particular calling, that the conduct of a particular activity is so packed with social and economic ramifications as to require its operations to be limited to a small or controlled number of companies. The State, therefore, exercises its power to exclude or prohibit *unconditionally* the establishment of such an enterprise.[35] The discretionary grant of a franchise or certificate of public convenience and necessity, is the device by which the State effects this policy. There exists a monopoly, or quasi-monopoly, which is state-created and state-sanctioned. But the State may be very generous with its grant of privileges. It may grant concurrent franchises, depending upon the nature of the business and the public interest to be served, to two or even more businesses. Exclusiveness is clearly not an essential feature of a franchise;[36] in fact, there are presumptions against the creation of an absolutely monopolistic status.[37] This control by franchise is to be distinguished, however, from the lesser right of the state, generally, to *condition* the establishment or continuance of a business upon the maintenance of certain sanitary, safety, or similar supervisory standards, or upon the maintenance of maximum seller's prices.

The Price Administrator has submitted a definition of the concept public utility, as he believes the term should be interpreted, which recognizes the franchise or monopoly characteristic. On page 31 of his brief he says:

> ...at the time Congress enacted the Emergency Price Control Act the term "public utility" had a general significance with

[35] See Brandeis, J., Dissenting in New State Ice Co. v. Liebmann, 285 U. S. 262, 304.

[36] Frost vs Corporation Comm., 278 U. S. 515, 521; Joplin v. Light Co., 191 U. S. 150; Illinois Power & Light Corp. v. City of Centralia, 11 F. Supp. 874, 878, remanded 89 F. (2d) 985 (C.C.A. 7th).

[37] Joplin v. Light Co., 191 U. S. 150, 157.

> respect to a particular group of businesses. If those businesses have a common characteristic, it is that their importance to the economic life of the community has been generally recognized as being so great as to warrant the community in according them monopoly status [which he admits is customarily accorded by a certificate of convenience and necessity] in exchange for the obligation to provide continuing service to all at reasonable rates. . . .

Aside from the Price Administrator's agreement that this attribute is part of the public utility parcel, there is an imposing amount of case authority in support.

In *Frost* v. *Corporation Commission*,[38] the Supreme Court listed a few familiar instances of businesses which are generally treated as public utilities. It did not include public warehouses, but it went on to say that those enumerated were merely "illustrations of a more comprehensive list" concerning which it stated:

> . . . it is difficult, upon any conceivable ground, to exclude a cotton gin, declared by statute to be a public utility, engaged in a public business, *the operation of which is precluded without a permit from a state governmental agency*, and which is subject to the same authority as that exercised over *transportation and transmission companies* in respect of rates, charges and regulations. Under these conditions, to engage in the business is not a matter of common right, but a privilege, the exercise of which, except in virtue of a public grant, would be in derogation of the state's power. Such a privilege, by every legitimate test, is a franchise. (Italics supplied)

In *Southern Ohio Power Co.* v. *Public Utilities Comm.*,[39] the Ohio Court, in denying an electric company public utility status, said:

> The Southern Ohio Power Company claims . . . that it has not at any time received any public franchise; and that it has never held itself out to the public as willing to serve the public generally; and that it never intended to nor did it in fact dedicate its property to public utility service . . .

In his dissent in *New State Ice Co.* v. *Liebmann*,[40] Justice Brandeis said flatly:

> If the business is, *or can be made*, a public utility, it *must be possible* to make the issue of a certificate a prerequisite to engaging in it. (Italics supplied)

The majority in the *New State Ice Co. case* in effect denied public utility status to an ice producing plant, declared by Oklahoma statute to be a public utility subject to license or permit from the Corporation Counsel of Oklahoma. The Court made it plain that it was the license or franchise feature of the Oklahoma law as applied to ice companies to which it objected. It did not feel that an ice company could be constitutionally subjected to such control because such

[38] 278 U. S. 515, 520.

[39] 110 Ohio St. 246, 143 N. E. 700, 701.

[40] 285 U. S. 262, 284.

an enterprise was "not the case of a *natural* monopoly, *or* of an enterprise *in its nature* dependent upon the grant of public privileges." (Italics supplied.) In the Nebbia case,[41] the Court excluded the milk industry from the public utility concept upon exactly the same basis, that is to say, that there was not present "any monopoly or monopolistic practice. It goes without saying that those engaged in the business are in no way dependent upon public grants or franchises for the privilege of conducting their activities."

In another Federal decision, *Publix Cleaners* v. *Florida Dry Cleaning and Laundry Board*,[42] involving the applicability of public utility regulation to a dry cleaning business, the public utility formula was promulgated in precisely the same disjunctive terms, *i.e.*, *either* that the business be a monopoly *or* that it be subject to a public grant or franchise.

> No one questions legislative authority, in the exercise of the police power, to fix prices for public utilities which render indispensible services, and enjoy in their business a monopoly *or* public grants or franchises, *and* which must serve all alike upon demand. The dry cleaning business is not a "public utility" in that sense. (Italics supplied.)

Besides being implicit in the duty to serve the public at fair and non-discriminatory rates, the right of the State to regulate, prescribe rates, and subject other operations of a public utility to varying supervisions is, although it is often not exercised, included within the greater right to exclude or to license. However, generally, all businesses affected with a public interest are subjected or are properly liable to subjection to some or all of these controls. The nature of the business, together with the economic evils peculiar thereto, are what determine the limits to which the State can go in this respect without contravening the rights involved in due process of law. The extent and variation of the innumerable controls imposed upon public utilities, however, is not germane to this determination. Judicial notice may be taken, however, of the fact that in many States there is an absence of various controls over certain public utilities. Delaware, for example, exercises no rate control whatever. This, however, and other instances of non-regulation, is a matter of local policy, and does not represent a want of power.

V. *Definitive Summary.*

I come out, therefore, in my partial promulgation of a public utility definition, with a composite formula, pieced together from an analysis of the judicial treatment in a fairly exhaustive review of the decisions. The quotations set forth herein reflect a unanimity of impression and understanding in both Federal and State judicial circles as to the considerations involved in the public utility concept. The definition was not stated in these opinions as upholding a classification made by statute, but as the lay and professional understanding and recognition of the term and what it involved.

This, then, is my exact position: If a business is (1) affected with a public interest; *and* (2) bears an intimate connection with the proc-

[41] 291 U. S. 502, 531.

[42] 32 F. Supp. 31, 34.

esses of transportation and distribution, *and* (3) is under an obligation to afford its facilities to the public generally, upon demand, at fair and non-discriminatory rates, *and* (4) enjoys, in a large measure an independence and freedom from business competition brought about either (a) by its acquirement of a monopolistic status, or (b) by the grant of a franchise or certificate from the State placing it in this position, it is for the purposes of the Price Control Act, as amended, a public utility, and subject to the exemption provisions of Section 302 (c).

It is these four attributes which make up the bundle or the public utility formula to the extent which I have promulgated it. The formula is a limited one. It is designed only to provide an absolute test or standard by which one may *affirmatively* determine that a particular business *is* a public utility. I do not wish to be misunderstood as indicating that a business possessed of or operating under less than the total of these features may not be considered a public utility. My formula has no negative or exclusive implications. What I do say is that, at least, *any* business which *does* possess and practice and operate under each and all of these features, is by a preponderance of considered judicial opinion a business in the public utility class. I feel that this supplies the natural significance and customary connotation which must be our guide in this controversy. Now, having cut the cloth of the contested concept, let us proceed to examine the attributes of the complainant's public warehouse and then determine whether or not it will fit the pattern.

VI. *The Statutory Regulation of the Complainant's Public Warehouse.*

The Constitution of California designates warehouses in which there is a public use to be public utilities and vests in the Legislature the authority to regulate all public utilities within the State.[43] Pursuant to these powers, the Legislature, in 1911, enacted the Public Utilities Act,[44] conferring the authorized power upon the Railroad Commission. The Act of 1911, however, did not include every warehouse within the definition of the terms "public utility", or within the regulations and controls set forth. Only those warehouses which serve the public generally, or any portion thereof, for compensation, were made public utilities and held to be subject to the controls stated. The term warehouse, as use in the Act, was expressly limited to

> . . . any building or structure in which property is regularly stored for compensation within this State, *in connection with or to facilitate the transportation of property by a common carrier or vessel*, or the loading or unloading of the same . . .[45] (Italics supplied)

This was supplemented in 1927 with

> . . . any building, or structure, or warehouse, in which merchandise, other than second-hand household goods or effects, and other than merchandise sold but retained in the custody of the vendor,

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[43] Art. IV, Sec. 33; Art. XII, Sec. 23.

[44] Enacted Stat. 1911 (Ex. Sess.) ch. 14.

[45] Sec. 2 (aa).

> is regularly stored for the public generally, for compensation, within this state, excepting warehouses conducted by any non profit, cooperative association or corporation which is engaged in the handling or marketing of the agricultural products of its members; . . .[46]

The California Act requires that such a public warehouse grant non-discriminatory and equal rates to everyone, giving the Railroad Commission the power to determine any question of fact relevant thereto.[47] The right to establish or operate a public warehouse of complainant's class is made subject to the complete authority of the Railroad Commission; a franchise in the nature of a certificate of public convenience and necessity is required to begin the operation of this business or to extend or expand existing facilities; and, the grant of this franchise may be refused by the Railroad Commission with or without a hearing, and, if granted, the Commission may attach to the right to engage in the business such terms and conditions as it deems the public convenience and necessity may require, or it may, at any time and for good cause, suspend, revoke, alter, or amend this right.[48]

In addition, the complainant is forbidden by the Act to alter any existing rate or charge without proper application to the Railroad Commission.[49] The Commission is empowered, either upon its own motion or upon complaint, to find that the warehouse rates are "unjust, unreasonable, discriminatory, or preferential." It may then determine the "just, reasonable, and sufficient" rate, and fix the same by order.[50] The Commission may also, upon its own motion or upon complaint, investigate a single charge, rate or rental of complainant's, or any schedule of its warehouse rates, and establish new prices, rentals, or charges in lieu thereof.[51]

Periodical reports are required to be furnished the Commission,[52] and there is other general supervision.[53] The Commission has the duty of investing all accidents occurring on complainant's premises.[54] It is empowered to institute safety regulations and to impose the use of certain appliances and equipment in complainant's storage operations.[55] Complainant is under serious restrictions as to merger or transfer of franchise, or the sale, lease, mortgaging, assignment, or incumbrance of its property, or any part thereof.[56] It cannot acquire any part of the capital stock of any other public utility,[57] and it must account to the Commission for the disposition of the proceeds of all sales of stocks.[58] And there are countless other regulations and re-

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46 Sec. 2-1/2, added 1927, ch. 878.
47 Sec. 19, Sec. 13 (a, b, c).
48 Sec. 50-1/2.
49 Sec. 15.
50 Sec. 32 (a).
51 Sec. 32 (b).
52 Sec. 29.
53 Sec. 31.
54 Sec. 44.
55 Sec. 35.
56 Sec. 51 (a).
57 Sec. 51 (b).
58 Sec. 52 (c).

strictions, the non-observance of which place complainant subject to serious fines and penalties.[59]

VII. *The Attributes of the Formula are present in the Complainant's Business.*

With cognizance of the complainant's statutory position, we proceed to determine whether the combination of attributes contained in our formula are present in its business.

(1) Business affected with a public interest.

Clearly, complainant's business is one affected with a public interest. *Munn* v. *Illinois*[60] determined this as to public warehouses. Nor can the absence of the term "public utility" in that decision in any wise be considered as an implied negation of the appropriateness of public utility controls over public warehouses. The term public utility was apparently not in vogue in that day, although its verbal constituents had been paired for other denotations[61] prior to the *Munn* case. There is evidence, however, in more recent Supreme Court decisions, that that Court has considered public warehouses to be in the public utility category. The *Munn* case has frequently been the only citation offered in support of a proposition of law relating to *public utility* regulation.[62]

(2) Relation to transportation and distribution.

It is not difficult to establish the intimate association between complainant's activities and the processes of transportation and distribution. The California Public Utility Act does not purport to deal with any but public warehouses, and it specifically excludes those public warehouses engaged in rendering services to second-hand household goods or effects, selling merchandise which is retained in the custody of the vendor, or handling the produce of agricultural cooperatives. This excludes a wide area of public warehouse activitiy. It reduces the types of public warehouses regulated, as I see it, to those whose activities bear an intimate relation to the processes of transportation and distribution. In Section 2 (aa), the only portion of the Public Utility Act containing a specifically affirmative statement relating to types of public warehouses included, the regulations are limited to those wherein "property is regularly stored for compensation ... *in connection with or to facilitate the transportation of property by a common carrier.* ..." (Italics supplied)

In its oral argument before us, complainant has urged that a public warehouse could not function properly without railroad facilities, that the *very nature* of the business required that it be so located as to receive prompt delivery by rail and so located in relation to the distribution area that it can give prompt delivery. Except insofar as it reflects a reciprocal reliance, however, our primary interest is not how

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[59] Sections 75, 76 (a, b), 81.

[60] 94 U. S. 113.

[61] Olmstead v. Camp, 33 Conn. 532, 546.

[62] Producers Trans. Co. v. Railroad Comm. of Calif., 251 U. S. 228, 231; Terminal Taxicab Co. v. District of Columbia, 241 U. S. 252, 254; also in, City of Phoenix v. Kasun, 54 Ariz. 470, 97 P. (2d) 211, 212.

dependent a public warehouse is upon railroad facilities, but rather how reliant are railroads and the general flow of commerce upon public warehouses.

Public warehouses, of the character involved in the present controversy, are in the very "throat" of commercial activity. Although they do not actually transport goods, they render an indispensible service "before the journey begins, when it ends, or along the way."[63] This intimate connection with the processes of transportation and distribution was the very reason that public warehouses were held to be devoted to a public use in the great case of *Munn* v. *Illinois*. There the Court, after describing the essential role of the particular public warehouse in the movements of grain in interstate commerce, stated:

> *The railways have found is impractical to own such elevators, and public policy forbids the transaction of such business by the carrier:* the ownership has, therefore, been by private individuals. .... Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, ... [etc.] ... pursues a public employment and exercises "a sort of public office," these plaintiffs in error do not. *They stand, ... in the very "gateway of commerce," and take toll*
> 7 *from all who pass.* Their business most certainly "tends to a common charge, and is become a thing of public interest and use." Every bushel of grain for its passage "pays a toll, which is a common charge," and, therefore, according to Lord Hale, every such warehouseman "ought to be under public regulation...." Certainly, if any business can be clothed "with a public interest, and cease to be *juris privati* only," this has been. It may not be made so by the operation of the Constitution of Illinois or this statute, *but it is by the facts.*[64] (Italies supplied)

In *Budd* v. *New York*,[65] the Supreme Court stated:

> ...the business of elevating grain is a business charged with a public interest, and those who carry it on occupy a relation to the community *analagous to that of common carriers.* The elevator owner, in fact, retains the grain in his custody for an appreciable period of time, because he receives it into his custody, weighs it, and then discharges it, and *his employment is thus analogous to that of a warehouseman.* (Italies supplied)

It seems, therefore, that a public warehouseman of the class involved holds himself out to serve the same general public as the railroad. The Price Administrator himself seems to have recognized this. In Amendment 1 to Supplementary Regulation No. 11[66] exempting certain commodities from price regulation, the Price Administrator included:

> (68) Transportation of commodities by persons offering their services to the general public as common carriers by rail, water, motor, pipe line, or other means of conveyances, rates charged for:

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[63] Lamar, J., Dissenting in German Alliance Ins. Co., v. Kansas, 233 U. S. 389, 436.

[64] 94 U. S. 113, 131, 132.

[65] 143 U. S. 517, 544.

[66] 7 F. R. 4738, 4739.

Provided, however, That charges for storage and warehousing and all other services incident thereto by any person shall not be excluded from the General Maximum Price Regulation.

At its least, this regulation reveals that the Price Administrator considered the services of certain warehouses to be so intimately associated with common carrier facilities as to consider and deal with the two together in enumerating a very extended list of commodities. Of greater relevancy, however, is the apparent fact that he expressly excluded warehouse services from an exemption relating to common carrier prices, lest the former, by natural implication, be considered to have been included with the latter. Needless to say, however, this effort of the Price Administrator cannot alter the natural significance of terms and meanings as employed by Congress.

Finally, I call attention to what I believe is an accurate equation in transportational proportion. Surely the vital position which the wharf occupies as regards water-borne commerce must be analogously accorded to the warehouse as regards railroad commerce. In this nation the quantity of railroad freight tonnage is many times that of water-borne commerce, and the public warehouse must be considered to have equalled if not surpassed the wharf in commercial importance. I think that it must be accorded a position commensurate with that achievement.

(3) Equal and reasonable service to the public upon demand.

In conformity with its statutory requirements, the complainant makes its storage facilities available to all who demand them at fair and equal rentals. The complete supervision and control over all aspects of this phase of the complainant's business has been described.

(4) The franchise feature.

Warehouses of complainant's class have been branded public utilities by the statutes of California, under proper constitutional authority. They have the imprimatur of the state. But more than a brand or label has been stamped. Warehouses of the complainant's class are dependent upon the grant of a certificate of public convenience and necessity. Moreover, the exercise of the right to engage in the business is subject to alteration, suspension, or revocation by the state, whose regulatory powers in this regard have been made very broad.

Both in statutory position and in actual operation we find the complainant's public warehouse to be clothed with each of the attributes comprising the public utility bundle, as set out in the limited formula promulgated.

In addition to possessing all the attributes in the four-pointed formula, however, complainant's rates are actually fixed by the Railroad Commission of California. Actual rate-fixing by the state, as distinguished from its unexercised right to fix rates, is a common, but by no means universal regulatory feature of a public utility. It is not one of the fundamental determinative attributes found to be present

almost without exception in the public utility bundle, but it is a frequent form of regulation or supervision applied to a public utility. There are other common regulatory features which are in this category (and which complainant possesses), such as an obligation to continue service, limitations upon stock transfers, restrictions upon the sale, leasing, transferring, or incumbrance of property, *et al.*

The actual fixing of rates by existing federal, state, and municipal agencies, however, was apparently relied upon heavily by Congress as a feature about public utilities generally which entitled them to be excluded from the supervision of the Price Administrator. Complainant has made much of this point, urging in particular that only those public utilities which were under the jurisdiction of existing rate regulatory bodies were intended by Congress to be included within the exemption.

The Congressional consideration of the Bill furnishes conflicting indications upon this score. Testifying before the House Banking and Currency Committee, Mr. Leon Henderson, later the first Price Administrator, made statements at several points regarding the exemption of public utilities:

(1) ... and public utilities were under what for the time being at least seemed to be an adequate system of State regulation, and therefore did not need to be brought into review. ...[67]

(2) ... Now, as to utilities. There is, as the members are aware, an adequate set of regulations as to the charges which utility companies can make. These, again, are based upon a long series of judicial determinations of State regulations and of State laws. It seemed to those drafting the bill that this was an area which was not likely to give difficulty or to cause, so far as they could see at that time, any inflationary trend. The bill is designed to control an emergency inflationary situation and has left them out, just as it has transportation rates. There are questions peculiar to utilities and none of them, so far as I see at the present time, would make necessary further regulation by means of a price-control bill.[68]

(3) ... I have found that everyone of the agencies charged with these particular items of cost (agencies of government in charge of public utility rates) are just as earnest as we are about keeping those costs down.[69]

(4) Mr. Patman.... I understood...that you were satisfied with the rate-making bodies in the States, and that that was the reason you did not ask that utility and transportation rates be included. Do I understand that correctly?

Mr. Henderson: I did not mean to limit it to existing regulatory mechanisms both in transportation and utilities. What I said was that the transportation rates themselves were already under regulation by Federal and State agencies,

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[67] Page 444 of exerpts from transcript of hearings before the Committee on Banking and Currency of the House of Representatives, Revised Part 1, held on August 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, and September 17, 18, 22, 23, and 25, 1941.

[68] Pp. 54, 55, *id.*

[69] Page 445, *id.*

> and I also feel that this is not an item, even in the absence of that regulation, to be brought under commodity price regulation.[70]

Congressman Steagall, Chairman of the House Banking and Currency Committee and the sponsor of the bill on the floor of the House, made the following statement:

> The bill also provides explicitly in Section 302(c) that nothing in the act is to be construed to authorize . . . the regulation of rates charged by any common carrier, or other public utility, which are *usually* subject to adequate control by State or other Federal agencies.[71] (Italics supplied)

The Amendments to the Price Control Act of October 2, 1942,[72] and the legislative discussion pertinent thereto lend some support to the complainant's position. Senator Norris had urged an amendment which would have placed limitations upon increases in public utility rates above the September 15, 1942 level.[73] From the Senate floor, he described the effect of the then existing law as follows:

> In the act creating the Office of Price Administration we specifically *excluded* from his *control all regulation of public utility rates*, such as telephone, gas, water, and electric rates, street car fares, *and so forth*. It was natural that such an exclusion should be made because the regulation of *all such rates* is provided for and controlled by various boards and commissions.[74] (Italics supplied)

The Norris amendment was rejected in conference. The conference report, however, contained certain language, referred to by Senator Brown as a substitute for the Norris proposal,[75] which reads as follows:

> *Provided*, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agencies as he may designate, and consents to the timely intervention by such agency before the Federal, State or municipal authority having jurisdiction to consider such increase.[76]

From the testimony before the Committee and the amendment agreed upon in conference, it is clear that Congress was giving substantial consideration to the existence of rate controlling agencies for public utility enterprises. Perhaps this was the moving consideration for their exemption. Certainly complainant's is a logical position to advance, in view of this testimony, and in view of the purposes of the Price Control Act. Because the complainant's rates are in fact sub-

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70 Page 626, *id.*

71 Vol. 87, No. 209, p. 9308, Cong. Record (Nov. 24, 1941).

72 October 2, 1942, c. 578, Sec. 1; 56 Stat. —, 50 U.S.C.A. (App) 961, *et seq.*

73 H. R. 7565.

74 Vol. 88, No. 155, pp. 7343-7346, Cong. Record (Sept. 10, 1942).

75 Vol. 88, No. 168, pp. 7970, 7971, Cong. Record (Oct. 2, 1942).

76 56 Stat. —, 50 U. S. C. A. (App) 961.

ject to complete controls by the Railroad Commission of California, however, I do not feel that it is proper or necessary for us, in the circumstances, to make a gratuitous determination as to whether existing rate control by some governmental body was made the pivotal factor in the exemption of a particular public utility. Since complainant, therefore, besides bearing all the burdens of the "bundle" of which I have spoken, has its rates fixed by an existing regulatory commission, it is not only a public utility within the virtually universal significance of the term, but it is a public utility which is operated and controlled in the manner which, it appears, may have influenced Congress to exempt the class, "public utilities" in general.

VIII. *Sundry contentions and arguments of the parties.*

The complainant has argued that Congress intended that the term public utility be construed as applied by federal, state, or local regulation. It feels that all businesses designated as a public utility by a particular law were intended to be exempted by Congress in its use of the term. The concept, public utility, is, however, more than a label. I have previously denominated it as a bundle of characteristics, enumerating the principle structural components. The state legislatures have been too generous with the use of the term to allow the assumption that Congress intended the complainant's superficial standard to govern. The use of the term by some of the states has, as Judge Maris has said, been so far broadened that in one of them, to cite an extreme case, it is defined to include "every corporation, or person now or hereafter declared by law to be affected with a public interest . . . ."[77]

I feel that Congress intended greater uniformity and more extensive control by the Price Administrator than to allow a name or a label, as applied by another governmental body, to thwart its anti-inflationary efforts. There are far firmer standards to adopt, and we cannot stop at the skin of a legislative designation of a business as a "public utility." We are obliged to indulge in some subcutaneous delving. It is characteristics and not names that control. For instance, the question: "Is a storage house or a warehouse a public utility?" is as insusceptible of an answer as is the question: "Is a vehicle which transports human beings a common carrier?" When the latter is posed, questions are asked, *characteristics and attributes are sought.* So it must be in the consideration of a public warehouse as a public utility.

The Price Administrator for his part has contended that a warehouse is a warehouse, and that if we hold complainant's business exempt, all public warehouses in all states would be exempt, however limited the controls they are under, because it cannot be considered the Congressional intent to exempt a certain kind of business in one state, and to include the *same* business in another state depending upon the existence and scope of local regulation. He argues that there must be uniformity throughout the states in the application of the Price Act.

Again—the fault in this argument lies in failing to treat public utility as a bundle of attributes. Businesses are not "the same"

[77] Colorado, Stat. Ann. (1935) ch. 137, Sec. 3. See also Dunagan v. Town of Red Rock, 58 Okl. 218, 158 Pac. 1170, 1172.

merely because they turn out the same product or handle the same commodity or facility. It is a false uniformity, indeed, that would be founded by looking only at the end product. It is far more than what a business offers for sale which determines its status as a public utility. The Price Administrator has criticized the complainant's contention that the state label should apply as promoting non-uniformity and irregularity, but the substitute scale which he submits seeks a similarly superficial standard. I am not forcing all warehouses into a single category. The realistic, analytic appraisal afforded by the formula I provide assures that an equitable and reasonable standard will be applied in the consideration of any particular warehouse. The nature of the business, how it is operated, and how it is regulated, rather than what it is labeled and what product it sells will be determinative. I am cognizant that there must be uniformity throughout the states in the application of a Federal law; this is a familiar principle of Federal statutory construction.[78] I believe, however, that uniformity cannot be achieved but by considering attributes, controls, obligations and method of operation.

The Price Administrator did not apply his so-called "uniformity" rule in issuing regulations under the Price Act. Therein public utilities are exempted from regulation. In Supplementary Regulation No. 11, Amendment No. 1, however, in exempting certain enterprises from price regulation, the Price Administrator included gas, electric, water, *et al.*, companies furnishing or supplying "*as public utilities.*" (Italics supplied) Clearly, however, if all companies producing gas, electricity, and water were public utilities, the quoted appendage to the exemption is superfluous. It is a well known fact that there are many companies furnishing these facilities which are not public utilities,[79] and any attempt to treat them as such would be in derogation of due process.[80] Some of them are public utilities, and some of them are not, all depending upon how they are organized and operated. One will be burdened with the essential characteristics of which I have spoken. Another will not be. One will be subject to the controls of the Price Administrator, the other will not be subject. So it is, and must be, with public warehouses.

The New Hampshire decision of *State* v. *Frost*,[81] is illustrative of the disposition of the courts in considering whether a particular business is a public utility, to regard not the commodity involved, but the extent of the obligations to the public and the manner of service required. The case is of especial value because it deals with public warehouses. A New Hampshire statute defined a public warehouseman to be anyone "who keeps and maintains a warehouse for the storage of goods, wares and merchandise." Referring to this statute, the Court said:

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[78] Lyeth v. Hoey, 305 U. S. 188, 194.

[79] Depauw University v. Public Service Comm. of Oregon, 253 Fed. 848; Allen v. Railroad Comm. of Calif., 179 Cal. 68, 175 Pac. 466, cert. denied 249 U. S. 601; Cawker v. Meyer, 147 Wis. 320, 133 N. W. 157; Southern Ohio Power Co. v. Public Utilities Comm. of Ohio, 110 Ohio St. 246, 143 N. E. 700.

[80] New State Ice Co. v. Liebmann, 285 U. S. 262, 284, 302; Producers Transportation Co. v. Railroad Comm. of Calif., 251 U. S. 228, 230; Tyson & Brother v. Banton, 273 U. S. 418, 431; Wolff Co. v. Industrial Court, 262 U. S. 522, 536; Associated Pipe Line Co. v. Railroad Comm., 176 Cal. 518, 169 Pac. 62, 66; State v. Barnes, 22 Okl. 191, 97 Pac. 997.

[81] —— New Hamp. ——, 17 A. (2d) 441.

> The recital that such a person shall be a "public" warehouseman seems a superfluous and meaningless designation. It is not intended that the business shall be a public utility with obligation to serve all who come for reasonable charges and without discrimination. Regulation is limited to that specifically prescribed [provisions for the negotiability of warehouse receipts], and there would be no lessened regulation if the designation were omitted.[82]

The Price Administrator has also urged that Congress could not have intended to include warehouses in the exemption clause as a public utility because the *majority* of states have not denominated them as such. He submits statistics which show that only three states[83] have included all types of public warehouses in the statutory definition of public utility, and that in only eight other states[84] have particular types of warehouses been so designated. I have already indicated that we should be unimpressed with mere labels. The imprimatur of the state is worthy of passing notice, it may serve as a starting point for inquiry, but it hardly touches the more pertinent problems involved. On the other hand, respondent's statistics are germane and informing, insofar as they reveal the extent to which the eleven states concerned regulate their so-called public utility warehouses. Respondent says each warehouse designated as a public utility is under an obligation to serve the public at large without discrimination. All are dependent upon state permission to engage in the business. In six instances a certificate of public convenience and necessity is required;[85] in the remaining five, licenses must be secured.[86] In the eight states which designate only particular types of warehouses "public utilities", a division is made upon the basis of warehouses used in connection with a common carrier[87] or warehouses storing important agricultural commodities[88] which enjoy a nation-wide market. Furthermore, in each of the 48 states public warehouses are subject to some regulatory agency, and in sixteen states that agency is a *Public Utility Commission*.

Although, as I have said, I do not feel it necessary that a warehouse or any other business enterprise be possessed of all of these attributes in order to be considered a public utility, it is nevertheless instructive to note that the eleven states, which have so denominated public warehouses, appear, almost without exception, to have imposed *all* of the attributes which are included within the four-pointed formula. If the other thirty-seven states have not as yet seen fit to impose, in substantial measure, corresponding duties and regulations upon their public warehouses, then, I feel, it is perhaps proper that the latter have not been designated public utilities in those states.

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82 —— New Hamp. ——, 17 A (2d) 441, 443.

83 California (The California Statute, as we have seen, does not pretend to be as broad as respondent claims), Indiana, and South Dakota.

84 Arizona (cotton and wool), Idaho (used in connection with a common carrier), Illinois (grain), Maine (used in connection with a common carrier), Nevada (used in connection with a common carrier), North Dakota (agricultural products), Utah (grain in connection with a common carrier), Washington (used in connection with transportation by water).

85 California, Idaho, Maine, Nevada, Utah, and Washington.

86 Indiana, Arizona, South Dakota, Illinois, and North Dakota.

87 See footnote 82, *supra*.

88 See footnote 82, *supra*.

Respondent, however, points out that in only three states[89] are types of warehouse *rates* determined by a rate-fixing agency, and th in only twenty-four additional states[90] are some types of warehou so regulated. He contrasts this with the high majority of states termining the rates and charges of gas, water, electricity, telepho and telegraph companies, etc. He concludes that a public warehou simply isn't one of the familiar, traditional enterprises that is co sidered and treated as a public utility, and that, therefore, Congre could not have had it in mind in exempting that class of enterpri from price control.

Complainant has countered with other statistics indicating th four states fix the rates of all types of warehouses,[91] that five stat fix the rates of warehouses used in connection with common carriers or railroads,[93] and that twelve other states fix the rates of warehou storing important agricultural products.[94]

It is not necessary to iron out the inconsistencies between the conflicting sets of statistics. Rate fixing by the state is not an accep able criterion for determining whether or not a business is a publ utility. I have hereinbefore stated that, although Congress may hav intended to make it the pivotal factor as to whether or not *a particula public utility should be exempted* under Section 302 (c), I do not co sider that *actual* imposition of rate control is necessary to *constitut* a business a public utility. Because the majority of states have no as of this date, considered it advisable to fix public warehouse rate does not mean that, when they feel the public interest demands i they will fail to impose appropriate regulations. Failure to act o to exercise a power is not to be confused with want of power. A though considerations of policy may stay its hand, the power of th state to control the rates of a public utility is clear. The submitte statistics, therefore, do not solve our problem. A counting of nose as to the states regulating the rates of a particular business is not th proper test, and certainly not a conclusive test.

Admittedly, some businesses, such as public gas and electric com panies, are regulated as public utilities more prevalently than othe kinds of enterprises, and, of course, it is a matter of more genera information that these businesses are so controlled. The extent t which a business has been subjected to public utility regulation, how ever, or the general knowledge as to that control, clearly does no affect the question.

My brothers who stand for affirmance have said that we must tak the term "public utility" in its "natural and ordinary meaning." They also appear to agree with the conclusions which I have reache as to that natural and ordinary meaning. They seek, however, t deny the appropriateness of that meaning in the case at bar, saying that in this particular act Congress employed a meaning which is

[89] California, S. Dakota, and Texas.

[90] Arkansas, Georgia, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Minnesota, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming.

[91] California, Indiana, Minnesota, and North Dakota.

[92] Idaho, Maine, and Utah.

[93] Georgia and Texas.

[94] Arkansas, Illinois, Iowa, Kansas, Missouri, Nebraska, North Carolina, Oklahoma, Oregon, South Dakota, Washington and Wisconsin.

narrower than the usual usage. They urge that the term was used in the Price Act to include only those familiar and traditional public utilities—"garden variety" stock, as Judge Magruder says. But those who assert a special meaning are charged with its proof. In the absence of a definite showing of the limited meaning, the natural and ordinary connotation must prevail. Any limitation must be delucible as a clear and ready inference from the Congressional language. I have looked in vain for such language.

It is true that the courts have given weight to an intervening administrative interpretation which has been the subject of considerable practice and tacit approbation. I do not feel, however, that it may be fairly said that the regulation, upon which the majority relies, imputes notice to Congress. The statement that warehouses and storage are to be considered subject to the General Maximum Price Regulation serves no indication that the Price Administrator did not consider such regulation subordinate to the provision of the Price Act exempting "public utilities" from regulation, and that he did not intend to exempt those warehouses which were so treated. The reliance upon such an interpretation begs the question which we are here called upon to decide, as I see it. At any rate, it can hardly be expected that Congress, as a whole, would be acquainted with the prodigal detail of the Price Administrator's orders and regulations, and particularly with an interpretation which was hidden in the recesses of a proviso to the 68th item of an order amending a supplementary regulation to an original order, which was of three and a half months' duration and had not been interpreted by this Court.

If Congress passed a law restricting the importation of all animals, would it be considered that the law was not applicable to a wou-wou because such is not generally known as an existing animal, and thus not an animal which Congress had in mind in passing the act? I feel that if Congress had intended, as the Price Administrator contends, to limit the exemption in question to a few of the more familiar businesses regulated as public utilities, it would have specifically enumerated those few intended. But the fact that the great majority of the states may not have imposed an obligation upon all warehouses to operate as public utilities cannot affect the fact that in some states certain public warehouses have been so constituted.

Often an enterprise may be one peculiar to only a particular region of the nation, *e. g.*, wheat elevators or cotton gins. By the Price Administrator's standard, however, these could not be considered public utilities because only a minority of the states may treat them as such. A few illustrations of the judicial treatment of a business after the imposition of public utility attributes thereupon, will serve to show this contention untenable.

In the Packers and Stockyards Act,[95] for example, it is provided that no one may "carry on the business of a market agency or dealer" at certain types of public stockyards unless registered with the Secretary of Agriculture, under the rules and regulations which the latter prescribed.[96] The Act forbids certain unfair practices in the industry. Stockyards are required to maintain equal service for all at equal rates,[97] and these rates and charges are subjected to regula-

[95] Aug. 15, 1921, c. 64, 42 Stat. 159; 7 U. S. C. A. 181 *et seq.*

[96] 42 Stat. 163, 7 U. S. C. A. 203.

[97] 42 Stat. 164, 7 U. S. C. A. 205; 42 Stat. 161, 7 U. S. C. A. 192 (b).

tion and control by the Secretary.[98] The transactions subject to the Secretary's supervision are stated to be those in the customary "current of commerce" as regards meat products "sent from one State with the expectation that they will end their transit, after purchase, in another. . . ."[99] In *Stafford* v. *Wallace*,[100] the Supreme Court attributed the following effect to this Act:

> The Act . . . treats the various stockyards of the country as great national public utilities. . . . It assumes that they conduct a business affected by a public use of a national character and subject to national regulation.

This designation has been reaffirmed and the stockyards definitely termed public utilities in recent decisions.[101]

In *Frost* v. *Corporation Commission*,[102] the Supreme Court upheld an Oklahoma statute making certain types of cotton gins public utilities and requiring one entering the business to acquire a license or franchise from the state.[103] Neither stockyards nor cotton gins are considered familiar, "traditional" public utilities. They are not "garden variety" stock. When, however, those engaged in these businesses in a particular area had been compelled to run their activities in a certain way, had had certain obligations imposed upon them by the state, and had been required to render certain services to the public generally, the Supreme Court was not hesitant in conceding full membership in the public utility family to *the particular businesses so treated*.

A highway tunnel company is certainly not a familiar "traditional" public utility. It grows in very few gardens. In *Parsons* v. *Detroit & Canada Tunnel Company*,[104] however, the Federal court in holding such a company to be a public utility said:

> The defendant tunnel company is properly incorporated under the General Corporation Act of Michigan, so called, under which many other public utilities are required to be incorporated. Railroad companies and railroad tunnel companies (as distinguished from highway tunnel companies such as the defendant) are required to incorporate under special acts. There is no special Michigan law under which all public utilities are required to incorporate, and *the Legislature has not defined public utilities*. Under these circumstances, the fact that the defendant company is organized under the act governing the organization of general business corporations is no indication, as contended by the respondents, that the property and business of the company is not properly classified as a public utility. Section 3555 of Michigan Compiled Laws of 1929 requires the property of certain rail carriers and of telephone and telegraph companies to be assessed by the

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[98] 42 Stat. 165 et seq., 7 U. S. C. A. 208 *et seq.*

[99] 42 Stat. 159, 7 U. S. C. A. 183.

[100] 258 U. S. 495, 516.

[101] Swift & Co. v. United States, 316 U. S. 216, 232; Atchison Ry. v. United States, 295 U. S. 193, 201.

[102] 278 U. S. 515. See also Chickasha Cotton Oil Co. v. Cotton County Gin Co., 40 F. (2d) 846 (C. C. A. 10th).

[103] Compiled Stat. of Oklahoma (1921), Sec. 3712.

[104] 15 F. Supp. 986, 997.

Michigan state tax commission and a specific tax paid thereon in lieu of other taxes. *Highway tunnel companies and many other public utility companies are not included.* This is no indication that the business and property of the defendant company is not properly classified as a public utility; there being nothing in the language of the statutes to indicate that a company cannot be considered a public utility unless it is included therein. *The purpose and nature of its business and devotion of its property to the public use under the circumstances involved, and not the statute under which it is incorporated or described for purposes of taxation, determines whether or not it is a public utility.* 51 C. J. 5. (Italics supplied)

Respondent has expressed a fear that such an interpretation will render the controls of the Price Administrator subject to being defeated because any enterprise may be put beyond his reach by being designated a public utility by the states. This argument has no weight, however, for in addition to statutory designation there must be the public utility characteristics, and the states are clearly limited in their right to control a business as a public utility. The limitations of due process are always applicable.[105] The case of *New State Ice Co. v. Liebmann*,[106] illustrates the attitude of the courts in limiting the power of the states to create public utilities. The Supreme Court of California, itself, has recognized this limitation, announcing that the courts will not sustain the imposition of public utility control upon any enterprise which is not of the proper character.[107]

The respondent argues that the definition of "commodity" in Section 302 (c) to include services rendered "in connection with the processing, *distribution, storage*, . . . of a commodity" (Italics supplied) expressly includes warehouses. But complainant has aptly pointed out that if this be so, railroads would also be included in the Price Administrator's control as they engage in the business of "distribution" of commodities. It is true that certain storage facilities are subject to the controls of the Price Administrator, but when a storage enterprise is conducted as a public utility, it falls within the provided exemption, which is dominant and controlling.

Allusion has been made to certain dictionary and encyclopaedic definitions wherein lists of public utilities have been formulated and in which warehouses have not been specifically included.[108] Other authoritative references have included warehouses,[109] but I think it will suffice to say, here, that those definitions wherein the term has been excluded either do not purport to be complete (often no more

[105] New State Ice Co. v. Liebmann, 285 U. S. 262, 284, 285, 307; Producers Transportation Co. v. Railroad Commission of the State of California, 251 U. S. 228, 230.

[106] 285 U. S. 262.

[107] Associated Pipe Line Co. v. Railroad Commission of California, 176 Cal. 518, 169 Pac. 62, 66.

[108] Compton's Pictured Encyclopaedia (1942) Vol. 11, p. 364; Moody's Public Utilities Index, April 10, 1943; New International Encyclopaedia (1930) Vol. 19, p. 347.

[109] Nelson's Perpetual Loose Leaf Encyclopaedia, Vol. X, p. 91A; Encyclopaedia Americana, Vol. 22, pp. 778-779; National Encyclopaedia (1942) Vol. 8, p. 301.

than three or four examples are listed), or, when the list is extended, the elementary construction rule of *ejusdem generis* is applicable.

Finally I might add that certain statements in the respondent's brief come close to committing him to an agreement that complainant's warehouse should be regarded as a public utility. Respondent admits that "certificates of public convenience and necessity are the customary device by which monopolistic status is accorded and protected." He further admits that monopolistic status together with the duty to serve the public upon demand at reasonable and non-discriminatory rates is the one common characteristic (if there be such) of a public utility. This is a substantial admission in view of the fact that respondent cannot, and indeed does not attempt to, deny that complainant operates under such a certificate and that it is under an obligation to serve the public in the manner described.

IX. *Conclusion*

I feel that it has been demonstrated that complainant's public warehouse is a business which is (1) affected with a public interest, *and* (2) bears an intimate connection with the processes of transportation and distribution, *and* (3) is under an obligation to afford its facilities to the public generally, upon demand, at fair and non-discriminatory rates, *and* (4) enjoys in a large measure an independence and freedom from economic competition brought about by the grant of a franchise from the state placing it in this position. In addition complainant has its rates fixed by an agency of the state, and it possesses many other customarily incidental features of public utilities.

Under these circumstances, complainant must be considered a public utility within the virtually universal significance of the term, and, thus, included within the meaning of the term as employed in the Price Act of 1942. Consequently it should be held that complainant is entitled to the exemption as provided in Section 302 (c), and that the General Maximum Price Regulation, Supplementary Regulation No. 11, and Amendment No. 1 thereto be set aside insofar as they purport to affect the complainant's charges concerned.

[fol. 147] UNITED STATES EMERGENCY COURT OF APPEALS

No. 5

DAVIES WAREHOUSE COMPANY, a Corporation, Complainant,

v.

PRENTISS M. BROWN, Price Administrator, Respondent

JUDGMENT

This Cause came on to be heard on the Complaint and Answer and on the Transcript of Proceedings before the Price Administrator, Office of Price Administration, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the Complaint herein be, and it is hereby, dismissed.

It Is Further Ordered that the Clerk of this Court transmit forthwith a certified copy of this Judgment to the Price Administrator.

Dated May 28th, 1943.

[fol. 148] WESTERN UNION

FA 448—108 NL—K San Francisco Calif 9

1943 Jun 10 AM 2 14

Hon Paul L Kelley, Clerk

United States Emergency Court of Appeals Wash D C—

Pursuant to provisisions of paragraph 7 of rule 38 of revised rules of United States Supreme Court, would you please certify ten copies transcript of record in Docket No. 5 Davies Warehouse Company versus Brown to clerk of that court consisting of the following: First complaint second answer third transcript of proceedings before the price administrator fourth opinion of the court dated May 28 consisting of separate opinions by Judge Maris Judge Magruder and Chief Judge Vinson and fifth judgment order dated May 28 dismissing complaint Stop Please ask assistant clerk Cullinan to telephone me Exbrook 1423 collect the minute record is received in his office Thanks and regards.

Reginald L. Vaughan.

7 28 5 28 28 1423.

[fol. 149] UNITED STATES EMERGENCY COURT OF APPEALS

I, Paul L. Kelley, Clerk of the United States Emergency Court of Appeals, hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 148, both inclusive, constitute a true copy of

(1) Complaint
(2) Answer of Respondent
(3) Transcript of Proceedings before the Price Administrator
(4) Proceedings in the United States Emergency Court of Appeals
(5) Designation of Record to be certified by Counsel for the Complainant,

in the case of Davies Warehouse Company, a Corporation, Complainant, v. Prentiss M. Brown, Price Administrator, Respondent, No. 5, as the same remain upon the files and records of said United States Emergency Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Emergency Court of Appeals, at the City of Washington, this tenty day of June, A. D., 1943.

Paul L. Kelley, Clerk United States Emergency Court of Appeals. (Seal.)

[fol. 150] UNITED STATES EMERGENCY COURT OF APPEALS

No. 5

DAVIES WAREHOUSE COMPANY, a Corporation, Complainant,

v.

LEON HENDERSON, Price Administrator, Respondent

ORDER

The Complaint having suggested the resignation of Leon Henderson as Price Administrator and the appointment and qualification of Prentiss M. Brown as Price Administrator, and having moved to substitute Prentiss M. Brown, Price Administrator, as Respondent herein in lieu of Leon Henderson, Price Administrator, and the Court being advised, it is

Ordered by the Court that Prentiss M. Brown, Price Administrator be, and he is hereby, substituted as Respondent in the above entitled cause.

I, Paul L. Kelley, Clerk of the United States Emergency Court of Appeals, do hereby certify that the foregoing is a true copy of an Order entered by the Court in the above entitled cause on January 25, 1943, as the same appears upon the records and files of the said United States Emergency Court of Appeals.

In Testimony Whereof, I hereto set my hand and affix the seal of the said United States Emergency Court of Appeals at the City of Washington, this tenth day of June, A. D., 1943.

Paul L. Kelley, Clerk, United States Emergency Court of Appeals, by Amelia Woods, Deputy Clerk. (Seal.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1943

The petition herein for a writ of certiorari to the United States Emergency Court of Appeals is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.